

consent to a modification other than as embraced in the proposed decree.

Mr. Horsky: I think that is right.

The Court: Either I approve it with their consent, or I say "Even though you have agreed to this, I cannot do it in good conscience and in the exercise of discretion."

Mr. Horsky: That is right.

The Court: Now then, if I say "I want this put in there, or that provision changed," and either one of them says to me, "We can't do that," there is no way that I can, in this informal hearing, compel them to do it.

Mr. Horsky: That is right.

The Court: And that means then that you reopen this [fol. 490] litigation, and that you have a trial. And I think that that trial embraces not only the usual modification of a consent decree, but it may well embrace a trial de novo.

Mr. Horsky: It could.

The Court: Which will go far beyond any provision of the consent decree as originally entered.

Mr. Horsky: It could, but it need not.

The Court: If a Judge is going to undertake this, he is going to go fully—I know if I were, I would go fully at length to finish this matter once and for all, and I am afraid that such litigation might possibly ring the death knell of ASCAP, and other similar associations.

Mr. Horsky: Your Honor, if you please—

The Court: And I have so expressed it in opinions before.

Mr. Horsky: Yes.

The Court: Now, if you want that, and that is the determined chase of the members of ASCAP, there is nothing I can do about it. I think that this licensing of copyrighted music is a very pressing problem. Perhaps you might reach the stage where you may get a compulsory licensing on a [fol. 491] minimum statutory fee basis as you do on phonograph records.

Mr. Horsky: Your Honor, I would like to say once, and I will pass on, that I see no insuperable problem in this decree, this proposed decree, if it were to be projected to the government coming in with a decree which reflects what your Honor would presumably say in a written opin-

ion as to what you thought were the inadequacies of this proposal, and asking approval. At that point there would be a hearing on whether it should be approval, and ASCAP—

The Court: I cannot approve that over ASCAP's objection without having a full fledged trial.

Mr. Horsky: Without having a hearing. You do not have to have a trial.

The Court: Without having a trial.

Mr. Horsky: Witnesses, that's right.

The Court: Witnesses.

Mr. Horsky: That's right.

The Court: Now then, since the original decree was entered into by consent, once I begin taking testimony the original consent decree is no longer valid.

Mr. Horsky: Oh, your Honor, I would like to submit a memorandum on that.

The Court: You can submit a memorandum on it, if you [fol. 492] want, but I have in mind the case that you have in mind, too. I have in mind that case.

Now, let me ask you one question, so I can focus my attention on your objection. What specific provisions do you feel are especially objectionable?

Mr. Horsky: All right, let me come to that. I wanted to outline the basic problem that I saw here, and now let me come to the specific.

The Court: You and I see the basic problem, and I think it is the same.

Mr. Horsky: The basic problem is that the people who have negotiated this decree do not truly represent ASCAP, the members.

The Court: What do you find is objectionable?

Mr. Horsky: Let me go on to what I find is inadequate.

First, let me come to the proposed voting system. The government has denounced the present system, as you have heard Mr. O'Donnell state, because it says 99 per cent of the publisher members are, in effect, disfranchised, and the dominating group of publishers who are less than 1 per cent hold absolute power in the Society by virtue of 67 per cent of the votes. They can cast that many, no matter what everybody else does.

[fol. 493] Now, one of the antitrust purposes of this suit, which your Honor has mentioned in your July order, has a factor to be considered in evaluating this proposed decree, is whether there shall be a democratic administration of the Society.

The proposal I submit to you, and then I will analyze it, does not change the situation. It leaves the dominant publishers in control.

The Court: Would you say it is an improvement on the existing decree?

Mr. Horsky: I suppose it is an improvement, if you cut it from 64 to 63.

The Court: It is an improvement?

Mr. Horsky: It is an improvement, yes.

The Court: In other words, under this consent we would have a more non-partisan—let's not get into the realm of politics—we would have a more non-partisan administration.

Mr. Horsky: No. It would be just a little different.

The Court: You concede it would be better than the present?

Mr. Horsky: It would not change the complexion of the board of directors. On paper it is better because you reduce their majority from 64 per cent to perhaps 51 per cent, and perhaps somebody would leave the dominant 10 and you might actually lose the majority.

Let me explain to you how this actually works. This is supposed to be a system which prevents people from having a position of unfair advantage.

Now, let me be clear that your Honor understands that the directors of this society, the board of directors, have tremendous power. They are the managers of the Society. They are the people who appoint all the officers, who appoint all the employees, who supervise the analysis of the formulae for distribution, supervise the distribution. So that when you are talking about the directors, you are talking about the real people who run the Society.

Now, the assertion is made, your Honor, that under the new system the percentage of the total votes for publishers now represented on the board of directors is cut

from 56 per cent down to something about 30 per cent. No, from 63 per cent down to 37 per cent.

Actually, it can immediately be increased from 37 per cent to 41 per cent by a readjustment of the affiliated members of this group, and it would undoubtedly be so adjusted [fol. 495] up to the 10 per cent limitation Mr. O'Donnell explained.

Incidentally, your Honor, this is all spelled out in the memorandum I have filed at pages 20 and 21.

The Court: It is spelled out in page 34 of the remarks of Mr. Dean on the West Coast, isn't it?

Mr. Horsky: Yes.

The Court: On August 18th, he points this out. 37 and 41 per cent from 63 per cent. What they have done, apparently, according to what appears to be correct—I have checked up on this, the statistics and the mathematical calculations seem to be accurate—they have cut it down from 63 per cent to 37 per cent, and with the affiliates they have cut it down from 78 to 41.

Mr. Horsky: That is right.

The Court: Now, I—

Mr. Horsky: Excuse me, I don't want to interrupt you.

The Court: That has cut it down from majority to a minority.

Mr. Horsky: No, sir. Let me explain.

The Court: Go ahead.

Mr. Horsky: That is a figure which is based on the total [fol. 496] possible votes cast, which could be cast. I would like you to look at page 22 of my memorandum, your Honor, and you will see that the actual vote is considerably less than the total possible vote.

The Court: I know, but that is not unusual. We know as a matter of common business affairs that the average large corporation, a controlling interest is not 51 per cent in a large publicly held corporation, but if you have 25 or 26 per cent you manage the corporation.

Mr. Horsky: That is correct.

The Court: People don't bother signing proxies.

Mr. Horsky: That is exactly what we are complaining about.

The Court: But that is due to their lack of interest.

Mr. Horsky: You have here, your Honor, a vote which amounts to somewhere in the neighborhood of 86 per cent, total, of the vote actually cast, valid vote cast. And if you add to the 10 largest publishers the two standard publishers who comprise the 12, you will find that the votes of the people, the dominant publishers represented on the board of directors now, are actually a majority of the total votes that will be cast and valid in the average society election.

[fol. 497] What I have asserted, and what I am prepared to prove, is that the change that has been made in this decree is not a change which democratizes the Society in the slightest. It leaves the absolute power over the board of directors precisely where it is now, particularly since, as your Honor said, it is not necessary to show 51 per cent to control a society of this sort. The 12 publishers who are presently represented on the board can pick up some votes, even if they started to open with 25, as you say. The rest of the votes are widely dispersed, 25 per cent is control. And we are talking, your Honor, about a charge that this group is a little conspiracy of its own, and that it, this little group, has been misusing its powers at the expense of the other members. That is what I want to be sure you understand, because it is this group which remains in control.

The Court: What would you suggest to the government on this?

Mr. Horsky: I would like to suggest this, your Honor. The best solution to this is not the one which is to give everybody one vote. That is not the best solution. That is one possible one.

The best solution, it seems to us, is to divide the board [fol. 498] of directors up into categories, and let the top 12 elect 4 directors, let some intermediate group of publishers with the next largest participation in the Society's affairs elect 4 directors, and let the large group who have a limited participation elect 4 directors. This will give some kind of a reasonable participation in the governing organ of this Society to all of its members.

It would certainly be far superior to this which will completely leave it just as it is now, with the same people

voted into office regularly with their 50 per cent-plus votes voted into office regularly.

The Court: The trouble is then that you are approaching it from a numerical basis.

Mr. Horsky: No.

The Court: From the number of membership, rather than from the type of membership, and what each member contributes, and, statistically, it sounds nice, but from a business point of view it does not add up to sense.

Mr. Horsky: Your Honor, this group that is in there now stands accused by the government—

The Court: All right. Apparently, they wouldn't consent to it anyway.

[fol. 499] Mr. Horsky: They probably would not.

The Court: What else do you find wrong or objectionable with this voting point?

Mr. Horsky: May I have one or two more minutes on the voting point to make one or two comments which I think are brief, but important?

The Court: All right. I thought we would take a five-minute recess, what I intend to do, if it is all right with everybody, I would like to hear Mr. Schaeffer today, so he does not have to come back from Chicago, unless his retainer calls for his attendance here tomorrow.

Mr. Schaeffer: I intend to remain over.

The Court: Does your retainer call for your attendance tomorrow?

Mr. Schaeffer: Yes, it does.

The Court: Then I do not have to be too solicitous. We won't interrupt Mr. Horsky.

We will take a ten-minutes recess to take a stretch, and give the stenographer a rest, and I will sit today until ten after 4. I have some people coming up at a quarter after 4.

(Recess.)

The Court: My statement was that I should allow two [fol. 500] days for this, and I think it is a fair estimate.

Continue.

Mr. Horsky: There were two other matters in connec-

tion with the voting arrangements of this proposed order that I would like to call to your attention.

The first one is, apparently, a slight concession on the part of the dominant publishers that there might well be at least one director who was not of their group, and, consequently, they have consented in this proposed order to paragraph 4E, which provides that any group of publishers combining one-twelfth of the total potential publisher votes may elect a director by the process of nominating him.

Actually, the only conceivable group that could possibly get together in favor of a single representative on the board of directors—this would be publicly done, not privately done—with the possibility of reprisals, the possibility of all sorts of things of that nature—

The Court: What reprisals could there be? You speak of reprisals. What reprisals could there be?

Mr. Horsky: Your Honor, this Society—

The Court: I mean what reprisals could there be for [fol. 501] which there wouldn't be either a remedy in either the Penal Law or by reason of a civil action?

Mr. Horsky: The possibilities, your Honor, are the possibilities which is designed to prevent, and which it does not adequately prevent, I assure you. To cut down the man's money, as what it really means, by determining the subjective determinations that the board of directors makes which determine the amount of revenue he gets.

The Court: If they are going to make those determinations according to a set formula—

Mr. Horsky: No, they are going to make them subjectively in many cases, your Honor. I am going to come to that. In many cases the government will admit these are subjective determinations, not mathematical, not ones where you simply sit down and rule it out with a ruler and say how much. They are subjective determinations. In any event, I suggest a provision which requires that at least 11 of the top people the dominant group get together on one publisher to be a nominee to the board of directors is not an adequate solution to the evil that the Government points out in its papers, and that is the domination of this Society by this group.

[fol. 502] The Court: Now, on that, don't you feel that this provision, which provides for representation by one director of a 1/12 group, is an improvement?

Mr. Horsky: Yes, it is an improvement.

The Court: Under this—

Mr. Horsky: I would say it is about a one-thousandth of 1 per cent better than it is now.

The Court: It is at least 1/12, isn't it?

Mr. Horsky: Certainly not, because you assume that if we have 1/12 of the directors not part of the dominant group that one has some power. He doesn't have any power.

The Court: I know, but don't you go on the assumption that only 1/12 of the writers or publishers with the votes will get together? Suppose there are three or four groups of 1/12? What is to stop that? What is to stop three or four groups of the writers, and three or four groups of the publishers, getting together, each having within their own group 1/12?

As I read this, I thought this, of all, was a substantial improvement. This, to me, and I am surprised reading it, Mr. Horsky, that you speak highly in protest against it, honestly.

Mr. Horsky: I do not speak in protest against—

[fol. 503] The Court: I recognize this one provision as being a step in the right direction, and I did not think that you were going to criticize this.

Mr. Horsky: I want to make it clear to you I am commenting on this provision because I want you to understand it is not a substitute for a fairly elected board of directors.

The Court: It is a step, and a substantial step, in that direction, but it is not perfection in and of itself. It is part of plan that may seem to be not perfect, as most of the things that man does on this earth are not perfect by any means, particularly when he is handling money matters. He becomes very selfish. It is human nature. And unless you are possessed of a great love for your brother man you want everything for yourself, you know. That is human nature. But this seems to me to be a step in the right direction.

I really thought that that said, when I read this yesterday—I read it again yesterday; I have read it about five times—and I said, “Now, that is something I don’t think anybody will have any objection to.” And you really dis-[fol. 504] appointed me.

Mr. Horsky: I am sorry. I still object.

The Court: All right, go ahead.

Mr. Horsky: You haven’t persuaded me.

The Court: Sir?

Mr. Horsky: You haven’t persuaded me that I shouldn’t object.

The Court: No, I don’t hope to dissuade you from that. It is like trying to convince a persistent lady. Sometimes the better part of prudence is, even when you recognize your wife is wrong, not to let her have her way but to let her say what is on her mind.

Mr. Horsky: I will leave this voting in matter with a request that you examine our memorandum which details some of this in more detail, but I would like, once again, to summarize why we are opposed to this provision of the decree, which is essentially the provision relating to the weighted vote.

The Court: Your basic opposition, as I take it—see if I correctly state your position—is, No. 1, ASCAP, the juristic entity, should not be recognized as a consenting [fol. 505] party, that they are not in a legal position nor in an economic condition for the Court to recognize them as a party which it should be considered.

Mr. Horsky: That isn’t the way I would put it.

The Court: That is the logical consequences of what you say.

Mr. Horsky: Let me put it that way.

The Court: If that is so, then I can’t approve any of this.

Mr. Horsky: Let me put it my way. This proceeding which is before you now is brought because of an internal dispute in ASCAP. It is brought because the Government charges that a dominant group in ASCAP is misusing the Society and diverting revenues unjustifiably, taking unjustified advantage of its competitors, who are the other members.

Now, you have inevitably, therefore, a dichotomy before you. You have the dominant group which stands accused of these practices, and you have the rest of the Society.

Now the dominant group is going to be restrained pro [fol. 506] tanto, by the decree which you have before you, if you approve it. I say pro tanto because it is going to be restrained only, in my judgment, slightly. But nonetheless, that group, which stands accused, and which is going to be restrained pro tanto, is the group which is being negotiated with on the decree, which has negotiated the decree. It is the defendant. It purports to be the Society.

The other members of the Society, who are alleged in the Government's own papers to be the victims of this conspiracy, and to have been suffering for the last nine years, or for the last 19 years, as a result of the conspiracy of this dominant group—and I am quoting the Government's papers now, not my assertion—is the group that is not represented at this hearing, except as you are permitting me now to speak. That is the reason I am intervening.

The Court: Don't you overlook one very important thing, and that is this. That the Government, represented by the Attorney General, is acting impartially to accomplish a just result, and that it is protecting not only the public but it is protecting, as best it can, and to the extent that it feels [fol. 507] it should, this minority group, including the minority group for which you speak? Don't you overlook that?

Mr. Horsky: No, I do not overlook that. I have not been addressing myself to that yet, because that is not the basis on which your Honor ruled out my motion to intervene in the first instance. You said I was represented by the Society.

The Court: Wait a minute. Excuse me. I think you have overlooked one of the reasons why I denied you a right to intervene. I denied you the right to intervene first, because you were represented by the Society, and by the Society with your consent, you having become a member of it.

Mr. Horsky: That is right.

The Court: Secondly, I denied you the right to intervene because you were not a named party to the suit, and the suit had proceeded to a consent judgment.

Third, I denied you the right to intervene because I felt that the interest that you represented and wanted to speak for was represented by the Government in the person of the Attorney General.

[fol. 508] Mr. Horsky: All right. Now, let me speak to—I think I have addressed myself to why I believe the Society, in the person of Mr. Dean, and the board of directors, who speak for them, today, does not represent me, or my client.

The Court: I am not going to hear you at great length on that.

Mr. Horsky: I do not want to take any great length of time.

The Court: Let's confine ourselves to this decree.

Mr. Horsky: Let me say one word why the Department of Justice does not, and it is as simple as this—

The Court: I would prefer, though I do not want you to be precluded from going into it, I would prefer you did not.

Mr. Horsky: All right, let me go on to the next thing to which we object.

The Court: All right.

Mr. Horsky: I think I have already stated what our alternative proposal would be. One which I hope will commend itself to your Honor, and which your Honor might—

[fol. 509] The Court: Suppose it does not commend itself to me? I have no right to compel anybody to consent to it.

[fol. 510] Mr. Horsky: No, sir. You can reject this one, though, with the suggestion that you would approve something different.

The Court: No, I don't do that.

Mr. Horsky: Then you can reject this one.

The Court: I am not going indirectly, without hearing evidence, to prejudge a case, and that is what you are asking me to do.

Mr. Horsky: I am not suggesting the need for that, your Honor. I thought perhaps you would.

The Court: I can't do that. I am without authority to do it.

Mr. Horsky: I thought if you rejected this order you would write an opinion.

The Court: No, Mr. Horsky. My power is limited either to approve it or disapprove what is submitted to me, that is all.

Mr. Horsky: Very well, I will talk to it on that basis.

The alternatives which I am suggesting would be those then that I would hope that the Government would propose to your Honor over ASCAP's objection.

[fol. 511] Now, let me go on to my next point. The second part of it, to which we object, is the portion which is in Section II of the proposed order relating to the objective survey of the performance of the works.

Section II of the order purports to improve the mechanics, or the provisions, of the 1950 decree with respect to per cent.

We have heard this morning an elaborate explanation of this proposal in terms of the sampling techniques which are now possible. I have no quarrel with the comments that were made about sampling techniques. I think you can make samplings that are pretty good. I have recently participated in a litigation in which that question was litigated, and we proved quite conclusively that the process of random sampling is a pretty good process.

That is not the point to which we have objection. There are two parts of this which make what you do to the system, what Joel Dean Associates will do, almost completely irrelevant. A sampling system is no better than the data which is fed into it, and that is what the trouble is with the present system, and that is what is the trouble with the [fol. 512] proposed system.

There are two objections, two fundamental difficulties, and I will state what they are, and then I will take them up one at a time.

The first one is the survey procedures inside ASCAP. I am talking to the part on page 36 of my memorandum.

The second part relates to the survey—

The Court: I will be happy to turn to that page.

Mr. Horsky: The second part refers to the survey of local radio and television performances.

The first one of these is the procedures inside ASCAP. This is the group—I am talking now about the ASCAP program department which is directly under the distribution department which is directly under the board of directors about which we have been talking; and this is where the discretion comes in which I have mentioned.

You have in this part of ASCAP a number of employees, some 250 people, who are taking the material, the raw material which is produced by the Joel Dean Associates random sample, and collating it, and tabulating it, and identifying [fol. 513] it, and what not.

There are a number of nice questions that come up in connection with how you put this particular bit of music, or that particular bit of music, into the system. All of this is done now, as you will see by the testimony which was given in the Congressional Committee which I have quoted in the brief, on the basis of verbal instructions. One of the clerks has a question and she asks somebody up the line, and it goes up and comes back down, and they make decision on the basis of which the tabulation is made. This is all before it ever gets to the random sampling numerical multiplication. This is the raw material. This is all done on a verbal basis, and when there is a question that comes up as to how it should be decided it goes to a group that is called the classification committee, which is the board of directors sitting as a classification committee. And they decide these questions as to whether it is to be in this category, or in that category.

This is all done, in other words, by a group of people, [fol. 514] an organization, under the direct supervision of the people who stand accused by the Government in this proceeding of having overreached the other members of the Society. And the organization leaves to that group the final decision, subject, I will admit, to an ultimate appeal to which I will come in a moment, to the American Arbitration Association, if you choose to protest. But the decisions are innumerable.

Let me illustrate how complicated they can be, and how difficult they can be, by looking at the machinery for the local survey. Mr. O'Donnell suggested that the decree improved the local survey machinery by increasing the sam-

pling by 50 per cent. That, I think, is a correct statement, but I think that he should more accurately, or perhaps it would have been a bit more informative, if he suggested that the survey of the local music has been increased from $\frac{2}{10}$ of 1 per cent to $\frac{3}{10}$ of 1 per cent.

That is the procedure which is proposed in the proposed decree.

Now, it is important to have the local music survey, because by definition it is different than the network. Local [fol. 515] music over local stations is much more apt to pick up the works of the people that I represent than it is the works of the dominant people on the board of directors. And it is important, therefore, that this be done as well as possible. It produces about $\frac{3}{5}$ of the revenue of the Society, local radio and television, and it is going to be done on this very, very minuscule percentage.

Now, the way it is done, your Honor, they have people that go out and put tapes on these local stations. These tapes are run for—well, Joel Dean Associates will say which station, and for how long, and what city. They come up with tapes, which is really just the program of the station. From a tape it is mailed back to New York, and some 250 girls, clerks, try to find out what the music is on these tapes.

Of course, many songs are announced—the singer, the name of the work, the name of the author—appears on the radio program, and you can tell by just listening to the tapes. But a tremendous amount of the music that appears on a local radio station is not announced, and this is particularly true of the non-featured music, the theme [fol. 516] music, the background music, the cues, the bridges, the jingles.

This, theoretically, your Honor, and I say theoretically with all sincerity, is supposed to be identified by these clerks from just listening to it.

The Court: You would be surprised at the facility with which some of these young people can do it. Even my five-year old grandchild will tell me the name of a song on a television or radio, and I don't know what it's all about. The same as he can tell me the make of an auto-

mobile that is driving by on the street. They perhaps pay a little more attention to it.

Let me ask you a question on this.

Mr. O'Donnell says that whereas before, has a basis of distribution, they gave the network programs a standing of two-thirds, and local programs a one-third basis, and the income from those sources were in a reverse order, now they have changed that and they have made it more realistic.

Do you agree with that statement?

Mr. Horsky: Yes, I do. That is better.

[fol. 517] The Court: Don't you agree, or do you agree—perhaps I should not put a leading question—do you feel, or is it your position, that this proposed method, proposed by the survey, is a fairer method of distribution than is now in effect?

Mr. Horsky: If you will permit me the 1/1000 of 1 per cent again, I will say yes.

The Court: You think it goes down to such infinitesimal, small fraction of improvement?

Mr. Horsky: Your Honor, here is the problem. The basic problem as you cannot do anything fundamentally to improve the situation as long as you leave it under the control and with the domination of this group of people.

The Court: I know. Now, what your complaint is, as I take it, is that while in your breast you feel this is an improvement, it is still not perfect.

Doesn't the decree recognize that perfection may lacking when it provides that we will try this out for, I think it is three years that it says, doesn't it?

Mr. Horsky: You are talking only about the Joel Dean Associates survey, your Honor. I am not talking [fol. 518] about that. I think that is all right, sure. That is an improvement. I am talking about the way that you get the raw material to feed into that system. No system of sampling is any good unless you have got good raw material to feed into it.

The Court: I suppose you are always going to have a certain amount, a certain percentage of human error, that will come into it.

Mr. Horsky: That we can live with, your Honor. Let me tell you what our suggestions are, and I think that will illustrate better than I can by talking about the problems here what I think might be done.

The first suggestion, and the basic one, is that this be taken out of the hands of ASCAP and contracted out to an independent organization which will remove it immediately from any control by the directors, or anybody else in ASCAP. And what ASCAP will get will be the results of this survey, which they can then feed into the sampling system and come out with the results.

The Court: You mean there should be sort of a super police agency constantly supervising the operations?

[fol. 519] Mr. Horsky: Not a police agency. Make a contract with someone to run the surveys for ASCAP and certify the results. It is perfectly feasible to do this.

The objection that has been made by the Society, by the dominant group in the Society, in negotiations with Justice is that it is too expensive. We would challenge that statement. We would believe that it was cheap. And in any event, we would like to know, in terms of actual dollars, how much more it would cost to see whether you could get more justice, and how much it would cost to get more justice than you have under the present system.

Now, this immediately relates, as you will see, to the first objection to the composition to the board of directors. This is all part of the same problem.

But what you have, your Honor is the concession that the dominant group which stands accused of misusing its powers up to this point remaining in control of the system which feeds the results into this perfectly good sampling [fol. 520] system that the Joel Dean Associates is going to create for them, or has created for them, and it does not make any difference what Mr. Dean creates, or doesn't—what Joel Dean Associates creates—it wouldn't do any good if the material that goes into it is perverted, and it can be perverted by this group.

Now, if it comes from an independent source, non-ASCAP personnel, non-ASCAP supervision, all that we get at ASCAP, in the Society, are the results—here are how many times these songs appeared on local stations, here are how

many times they appeared on networks—you eliminate the potential of damage and of wrongdoing which the dominant group has had—I wouldn't say proven against it, but which it has been alleged by the Department of Justice to have engaged in in the past, but which they leave completely within their power in the future under this proposed system.

That seems to me to be wrong, and that I would respectfully suggest to your Honor is the basis upon which this should be rejected.

The Court: You see, what bothers me in this whole matter is this. Here I have a proposed consent decree sub- [fol. 521] mitted to me purporting to be consented to by ASCAP, but the men who are in ASCAP, or the companies that are in ASCAP, are here voicing a word of protest about what their duly appointed agent wants to accomplish.

Now, your association is a voluntary association, and there is nothing that compels anybody to remain in ASCAP that I see; nothing at all. Now then, I do not know that the Court should inject itself into trying to regulate the internal affairs of ASCAP. I do not know that the Court shouldn't say, if there are such a number appearing here—and I don't know what you men represent in point of view of being a substantial part of ASCAP—to the Attorney General, "You did the best you could, and you thought you were doing what you thought was right and just, and in line with your duty in this industry, but they don't agree with you, some of these people don't agree with you. Why go ahead and try this case?"

Is that what you men who object want to see accomplished here?

Mr. Horsky: Yes, sir. I would like to have a hearing on this proposal.

[fol. 522] The Court: I can't have a hearing on this proposal.

Mr. Horsky: I know.

The Court: That means a trial of the basic issues of the complaint, or the amended complaint.

Mr. Horsky: It does not necessarily, your Honor.

The Court: You and I differ on the law.

Mr. Horsky: With your permission, I will submit a memorandum on that.

I think you can have a hearing on an amendment to a consent decree.

The Court: You can have an amendment to a consent decree where it is consented to.

Mr. Horsky: I said a hearing on an amendment to a consent decree.

The Court: I am giving you that. I cannot take testimony on a consent decree unless I have the consent of both the parties to a litigation, and that I so hold.

Mr. Horsky: Let me continue with my objections on this proposal.

I have one more matter on this local survey which I think [fol. 523] would suggest to your Honor why this seems to us so important. As I say, the people whom I represent are particularly interested in the local survey, and they will be the ones who will suffer if the material which is fed into the Joel Dean Associates random sampling machinery is not fair material.

When the clerks that I have described listen to these tapes and put down what they can identify on the cards—and, incidentally, the brief notes that there is a standing offer from one of my clients to withdraw all objections if any clerk can recognize half the music on any tape, which has never been taken up by the Society—

The Court: If you put it in writing, Mr. Dean may take you up on it right now.

Mr. Horsky: It is here in writing, your Honor.

The Court: I have a relative about my age, who every once in a while induces me to go to a family party. He cannot only identify the song being played by the orchestra, but can sing the words.

Mr. Horsky: He is not employed by ASCAP. I wish he [fol. 524] were, your Honor. I wish he were.

The Court: He is not, and I do not think he would take it. I think he has a more lucrative business.

Mr. Horsky: Let me characterize it the way the Government characterizes it.

The Court: Did you want to say something, Mr. Dean?

Mr. Dean: I did not hear precisely what his offer was. I would like to have it read back.

The Court: His offer was if any clerk could recognize

half the tunes played on any tape one of his clients will withdraw any objection he might make.

Mr. Horsky: It is on page 43 of my memorandum, Mr. Dean.

Mr. Dean: The other client would not so withdraw, as I understand it.

Mr. Horsky: That is right.

Let me read what the Government says in its memorandum on page 4:

"The tapes are then sent to the ASCAP office in New York where they are played by a group of employees having no special musical qualifications, who [fol. 525] attempt to identify these songs and thus make a record of performances."

The hearings before the Congressional Committee revealed that there were 16,000 pieces of music which were not identified in the course of a year by the local survey, even on this 2 per cent sampling basis. The distortions this can produce are enormous, literally enormous.

As one illustration of the way in which the directors have powers to, if I may repeat what I said before, inflict economic reprisals, the Society gives to the directors a discretion, as I think Mr. O'Donnell recognized, in public domain music to determine a percentage of credits which public domain arrangements could receive.

There is a vast amount of that kind of music published by a vast number of publishers, and a large number of writers, and the amount of credit which a publisher gets for that kind of work, which is played, depends on the extent to which the Society has chosen to regard it as containing new medlodie material, new lyrics, and the like.

This does give a tremendous amount of discretion, and it also creates tremendous difficulties in identifying the [fol. 526] music on the local survey.

The other thing I would like to mention on the local survey is this. Once the clerk has listened to the tape and has determined as much as can be determined by her of the music that is played on it, the tape is erased. There is no possible way that one who objects can find out what

actually did happen in the survey. The Society does not keep any of the proofs, and, consequently, the appellant procedure, which is spelled out in this decree, does not really protect the people that I represent against errors, deliberate or otherwise, that would occur in the sampling process.

The Court: We will let you continue tomorrow morning at 10 o'clock. We will adjourn until 10 o'clock tomorrow morning.

(Whereupon, at 4.10 p.m. Court adjourned to October 20, 1959, at 10.00 o'clock a.m.)

[fol. 527]

Civ. 13-95

UNITED STATES OF AMERICA

—vs.—

AMERICAN SOCIETY OF COMPOSERS,
AUTHORS AND PUBLISHERS, et al.

New York, October 20, 1959,
10 A.M.

Present:

Mr. O'Donnell, Mr. Bennett, Mr. Karsted, Mr. Wilson, Mr. Dean, Mr. Milman, Mr. Finkelstein, Mr. Pecora, Mr. Cutler, Mr. Horowitz, Mr. Terry, Mr. Finkelstein.

The Court: All right, Mr. Horsky.

Mr. Horsky: Thank you, sir.

The Court: Continue. I would like to complete the hearings on this matter today. I set aside yesterday and today, and if it is necessary we will continue tomorrow afternoon. [fol. 528] However, it seems to me that two days of this will be about the limit of judicial endurance for oratory.

Mr. Horsky: I will try not to trespass on your time any more.

The Court: No, it is my job. All right.

Mr. Horsky: I have one more part of this decree to which I would like to draw your Honor's attention. But, before I start on that, I should like to say that I have been advised after the Court rose yesterday that I have made an error in a statement of fact which I should like to correct for the record.

Mr. Dean informed me after the Court rose that the tapes which the Society maintains of local broadcasts, that is, the monitoring that they do around the country, are preserved for two years. I had not stated that to your Honor in my statement.

I should like to comment that I don't know when this two-year rule was instituted.

The Court: Maybe Mr. Dean will tell you now.

How long have they been kept for this two-year period?

Mr. Finkelstein: For at least three years, I think, your Honor.

Mr. Horsky: And I should also like to call to your attention, [fol. 529] your Honor, that a writer member of ASCAP gets his detailed statement of his earnings from ASCAP a year after the earnings accrue. Specifically one of the managers of one of the applicants for leave to intervene whom I represent is a writer and he received within the past ten days his statement of his earnings from ASCAP for the period from October 1, 1957, to September 30, 1958.

The Court: I know. That was not declaring a bonus of a year end dividend. That is a part of doing business. What do you suggest be done there? Do you think it is feasible to have six months statements?

Mr. Horsky: If you would let me finish my point, sir.

The Court: I am sorry.

Mr. Horsky: I am pointing out that his statement that he received was for the period from October 1, 1957, to September 1958. That is a year ago. If he were to take the nine months which is permitted him by the proposed order within which to determine whether he should challenge that statement, he would find upon application to the Society that under the two-year rule of preserving tapes nine months of the tapes for the period with which his

statement was concerned would already have been destroyed. [fol. 530]

The Court: That seems to be easy of remedy.

Mr. Horsky: That's right.

The Court: If they can keep the tapes for two years without too much expense I suppose they can keep them for three years.

Mr. Horsky: That's right. They do not. That is my point.

The Court: Is there any difficulty on that, Mr. Dean?

Mr. Dean: Not the slightest, your Honor.

The Court: You are willing to recommend that to your client?

Mr. Dean: We will recommend any procedure which gives every member of ASCAP full access to our records.

The Court: It seems to me that maybe Mr. Horsky has made a suggestion that might in fairness be adopted. Instead of keeping them for two years, keep them for three years.

The Court: Do you find any fault with this yearly statement?

[fol. 531] Mr. Horsky: No, sir. I simply want to—

The Court: I don't think it would be feasible in a business enterprise of this nature to get out these statements on a quarterly basis or half year basis.

Mr. Horsky: I am not suggesting that. I am simply calling attention to the time factor.

The Court: Then I think your objection will be met if the Society keeps these recordings instead of two years, keeps them for three years, keeps them for one year after the date that the statement goes out.

Mr. Dean: That is quite agreeable, your Honor.

The Court: That would be better.

Mr. Horsky: One year after the period—

The Court: The statement goes out after the period.

Mr. Horsky: The statement came out last week.

The Court: Then I would suggest to the Society that they keep these recordings for one year beginning after the statement is mailed out.

[fol. 532] Mr. Horsky: I think we are not quite meeting on this issue, your Honor.

The Court: I think I have given you more than you have asked for.

Mr. Horsky: As you phrase it, you have not, because the point that your Honor is overlooking is that the statement covered the period a year ago. The statement that was just received covers a period which ended 12½ months ago.

The Court: Yes. I am suggesting—

Mr. Horsky: Yes, sir, they keep them for a year after today, it won't cover any of the period that is involved in this statement.

The Court: Perhaps I am dense.

Mr. Dean: For the period for which the accounting is given to the member, which, let us say, is for the fiscal year ending September 30, 1958, they will go out the following July. We will keep them for a year after we mail the statement to the member.

The Court: That is exactly what I suggested. I think that gives you plenty of time, it gives even more time than three years.

Mr. Horsky: That is not involved in the proposed order. [fol. 533] This is just a matter of detail.

The Court: I know, but while we are discussing this matter, if you bring out something that I think should receive attention I want to find out what the position of the Government and the Society is on it.

Mr. Horsky: I am very happy to have this concession by the Society.

The Court: The Government has no objection to that?

Mr. O'Dornell: None at all, your Honor.

Mr. Horsky: Let me turn to the third part of the order, your Honor, to which we would like to call your attention and to which we believe you should not give your approval. This concerns III(F) of the order of the weighting rules and the weighting formula. The problem here needs to be distinguished, needs to be divided into two parts. There is no criticism on the part of the applicants to intervene, the applicants whom I represent, there is no objection by them to the power granted to the Society to distinguish in terms of the credit that shall be given for the playing of a member's work, between a work which is played as a feature

[fol. 534] performance and a work which is played as a theme or as a bridge or as background music and the like. In other words, we are quite agreeable and we make no challenge and I just want to put this to one side, to the theory which says that it is worth more in terms of performance credits to have a work performed as a feature than it is to have it performed as background music.

Whatever formula that is properly adopted for that purpose is perfectly all right with us. Our criticism is directed solely at the part of the order which provides that you may distinguish between members of the Society when you play their works in exactly the same way for exactly the same period of time and in exactly the same program and give one member of the Society more for his work than you do another member of the Society for his work, for identical performances, in identical circumstances, even on identical programs.

Now, under the present practice of the Society, not under the proposed order, under the present practice, this discrepancy is as high as 1000 to 1, that is not hyperbole, this is actual mathematics, one member of the Society [fol. 535] will receive for the playing of his work as background music 1000 times as much money as another member of the Society will receive for his work played in exactly the same way and exactly the same program for the exactly same time as background music.

The Government properly objects to that. Because, as it turns out, this rule benefits the dominant members of the Society who own almost two-thirds of the works which get the 1000 to 1 advantage.

Under the proposed order, it is provided that this advantage be cut down. We believe, your Honor, that it should be abolished and that every member of the Society should be treated equally in terms of the amount of credit which is received when his work is played. Let me try and explain the philosophy of this.

It is asserted that the reason why this discrepancy is proper is that certain works in the Society's catalog are better known, are more important, are older, they evoke more pleasant stimuli when they are heard on the radio or on the television and, therefore, they are entitled to

more credit. There is no doubt that certain works in the [fol. 536] Society's catalog are worth more than other works. There are works that will earn a great deal of money. There are works that will earn a very small amount of money. There have been hits and there have been not-hits.

Of course, there is one absolute way in which these works may be valued and that is how many times do the licensees play them. If you have a hit tune and it is a persistent popular tune and will last for the full 56-year period of the copyright and have recurring stages of popularity, sure it will earn considerable money for its author and for its publisher, because it will be played over and over again. It will show up on the logs of the networks. It will show up on the logs of the local stations. It will earn performance credits.

If you have a tune which is a fly-by-night, popular for two days and then ceases to be popular, it will earn a little bit and then it will not be heard any more. We believe that the test to be applied properly to the evaluation of works of music which are owned by members of the Society is the test which is properly applied in terms of their [fol. 537] actual acceptance by the audience, by the licensees, the people who deal with the Society for their business. In other words, we would suggest that rather than under the modified proposed order that the thousand to one be cut down to something less than that, that your Honor should not approve this because it still maintains a basic unfair distribution of the Society's revenues to the dominant members of the Society. They still own two-thirds of these tunes.

The Court: Of what tunes?

Mr. Horsky: Of the tunes that get the advantage.

The Court: Of the tunes that have durability?

Mr. Horsky: Of the tunes which are called in the proposed order the qualifying works. These are works that are permitted under the order to have an advantage now not of a thousand to one, as they have at the present, but if they are played as themes or bridge or cue music, which terms are defined in the order, they get an advantage of 10 to 1. If they are played as background music their ad-

vantage may go up under the proposed order even as [fol. 538] high as a hundred to one.

The Court: Hasn't that been a substantial improvement? In one case it has been reduced 100 per cent and in another case it has been reduced at least 10 per cent.

Mr. Horsky: It is not as bad as a thousand to one.

The Court: It is a considerable improvement, is it not?

Mr. Horsky: It is an improvement.

The Court: Considerable improvement?

Mr. Horsky: Considerable is determined whether you believe it has any justification at all.

The Court: Let me see if I understand your point, because I have read this and I think I do understand it, but I want to be sure.

In this group of songs which are given special treatment—

Mr. Horsky: Qualifying works they are called.

The Court: Let us use which practical term you want. Such a tune, for instance, as Tea For Two—

Mr. Horsky: I don't know if it was a qualified work.

[fol. 539] The Court: I would imagine it would be. That is a song and a theme that I have heard, my children have heard and my grandchildren hear and still enjoy. Shouldn't that receive some special treatment as a qualifying tune by reason of its durability?

Mr. Horsky: Surely, your Honor—

The Court: It is like a staple in a store, it is staple merchandise. If you don't sell it one year, you sell it the next. People are always coming in and asking for it.

Mr. Horsky: Sure, you have to evaluate how much more it should get but how much it is played.

The Court: I don't know. For instance, a storekeeper always has to have blue serge suits in his stock, yet he does not sell too many of them. But there are those of us who like to have at least one blue serge suit in our wardrobe when we can afford two suits. That is a staple. These songs are staples. They have durability. They are part of your stock in trade and without them you cannot conduct your business. I think this is a substantial better- [fol. 540] ment, admitting the ratio was far too large the Government has by its negotiations brought that down to within a reasonable range. Let us try this out.

I am not impressed with this objection, Mr. Horsky, very frankly.

Mr. Horsky: Let me leave it with you and go on to the subsidiary objection which I have on the same point. I don't mean to say I am abandoning my position. I think you understand it and I have stated it as best I can.

The Court: You can attribute this just to the obstinacy of the Court.

Mr. Horsky: I won't do that, but I am glad to have your permission to do that.

How is a qualifying work defined? This definition is set out in the rules, the weighting rules and the weighting formula. The part of it which seems to me that cannot receive your Honor's attention properly is that in order to become a qualifying work you may rely on the records of ASCAP which have been as the Government charges and as I think everyone will admit inadequate and under the control of the very people who are here charged with [fol. 541] the conspiracy to run the affairs of the Society to their advantage and to the disadvantage of their competitors.

More specifically, it is possible for a work to become a qualifying work by having accumulated 20,000 performance credits, which are performance credits on ASCAP's books. These records are not reliable. They are records which have been put together for the benefit of the dominant publishers, and yet the proposed decree, the proposed order would perpetuate by allowing reference to those records, the unfair and improper advantage which these publishers have created for themselves under the present system of doing business, and which the Government has characterized as unfair to their competitors in their memorandum now before you.

It seems to me that it is an imposition on the Court to say that it should approve—

The Court: Mr. Horsky, on this definition of qualifying works, as I read it, a work to be a qualifying work must need not only this test that you just pointed out but it must also meet the test of an accumulation of 2500 feature performance credits during the five latest available pre-[fol. 542] ceding fiscal year surveys.

That means that since we are going to continue to operate under a new survey, that ultimately in the passage of time, with the help of the Lord, if this thing continues, we are going to have more and more of these eliminated and eliminated on the basis of a survey which will be under constant supervision of the Attorney General and perhaps of the Court. Ultimately these wrongs which you say exist will be corrected. It will take a little time to do it.

Mr. Horsky: That is not so, your Honor, I am sorry.

The Court: Let me hear why it isn't so?

[fol. 543] Mr. Horsky: Let us assume that there are two works now in existence, one owned by a dominant publisher which by this thousand to one advantage, which I have just mentioned—

The Court: Now we are down to a hundred to one.

Mr. Horsky: There is a work owned by a dominant publisher that has had by the thousand to one advantage a chance to accumulate 20,000 credits. There is a work owned by a non-dominant publisher, by one of my applicants, which because it has been accumulating credits at one thousandths of the rate has two thousand credits. Both of them are presently being played far in excess of the rate of 2,500 credits which was acquired during the preceding five years, there is no way that the work owned by my applicant will ever accumulate the position, will ever achieve the position owned by the work of the dominant publisher. That discrepancy is not going to be eliminated by the passage of time at all. That is the discrepancy I am suggesting to you. That is the discrepancy which I think should not receive your sanction. I believe I have made the point. I don't want to take more time than is necessary. But that basically is our objection to Section III of the order.

[fol. 544] There are two or three other minor provisions. I say "minor" because I don't think they have the same magnitude as the one I have been discussing, which I would like to call to your attention.

One of them is the provision with respect to foreign distribution. It has been the practice of the Society to distribute all foreign revenues on the basis of the data which it received from England, Canada and Sweden.

The Court: Let's come to that qualifying works business. Let me ask you this question. That is on page 3 of the weighting formula. Do you gentlemen have it?

Would ASCAP be agreeable to changing it so as to make it read "a work complying with one of the following tests"? And then after I "or" and then II?

Mr. Dean: No, your Honor, because Mr. Horsky's presentation has very carefully left out the essential feature of the definition. If you will look at I under (C) it is: The accumulation of 20,000 feature performance credits. Your Honor, the thousand to one ratio does not apply to feature [fol. 545] performances. All through his presentation Mr. Horsky has very carefully left out that word. That is a very important distinction.

Mr. Horsky: Your Honor, may I make a reply to that?

The Court: Yes.

Mr. Horsky: None of the records of ASCAP prior to 1955 distinguish between feature performances and any other performances. There is no way to find out whether these 20,000 credits were earned as feature performance credits from ASCAP's records. That is not in dispute.

The Court: Is that a fact, Mr. Dean?

Mr. Dean: That is why you have subdivisions (B) and (C), your Honor. It was very carefully worked out with the government so that this could be established under (C) on page 3 of the weighting formula we have (b), that any work first performed before January 1, 1943, shall satisfy the requirements of subparagraph (A) one above. In the event such work has not accumulated 20,000 feature performance credits since such date, if the title of such work appears in the publication of Variety—

The Court: I see.

Mr. Dean: And (C) is the other paragraph.

[fol. 546]. The Court: All right. I see. Go ahead to the next point.

Mr. Horsky: The next point, your Honor, deals with the distribution of foreign revenue. As I have said, the system that has been applied in the past was to distribute all foreign revenues on the basis of the actual results from England, Canada and Sweden. This operated very much to the advantage of the dominant publishers whose princi-

pal revenues would have been derived from the performance of English works and who, therefore, benefited by having German, Italian and other countries' revenues divided in the same way.

This is now changed mildly so that, if the revenue from a foreign country exceeds \$200,000, and if the reports are such from the foreign country that it can be allocated to the individual and the publisher by specific amounts, it will be so administered.

On the other hand, if it does not achieve \$200,000, it is not so distributed, which leads to this result: that if the revenues from the Italian performing society are meticulously detailed as to who is entitled to how many dollars, but they total up to \$195,000, it can be distributed in the discretion of the dominant publishers who will remain in [fol. 547] control of the board "on the basis"—I am reading—"of the most reliable information ASCAP has as to foreign performances generally"; in other words, a pure, open-ended provision which gives them the power to allocate it to their own advantage. It is a provision which is an illustration of the situation which I mentioned to your Honor yesterday, of the discretion which is vested in these publishers.

I believe I am correct in saying that the reason the Swedish remittances are distributed is that Sweden has said that it won't contribute anything unless it is assured that they go to the proper people. It seems to me that it is incredible that the Society would not be willing to take money which is specified for a particular work, a particular composer, in the Italian receipts, for example, even if it is only 15 cents, and send it to the appropriate person in this country and not lump it all into a huge pot. It seems to me that this is a provision which should not have your sanction.

The Court: Well, unfortunately in our system of society we have to yield some of what we believe to be our individual rights for the benefit of the whole. That is part of our system of society and way of living. And so it must be in a society such as this, that in order to make the society work and function someone must at times give out [fol. 548] for the benefit of his fellow members what he,

according to the strict letter of the law, may be entitled to. It is a contribution that has to be made as a result of living together.

Here you have 6,400 people living together in this one group.

Mr. Horsky: Your Honor, that would be much more persuasive if we did not have a situation in which you have a charge under the antitrust laws that the group which is going to divide this up has conspired to deprive competitors of their advantage in violation of the Act..

The Court: Even the clients on behalf of whom you speak have been so charged.

Mr. Horsky: No, no.

The Court: Oh, yes.

Mr. Horsky: No, I am sorry.

The Court: You are so charged by being members of the Society.

Mr. Horsky: There are two separate conspiracies here, your Honor. I want to be sure that I make this point clear to you. There is a conspiracy with which we stand charged as well as the members represented by Mr. Dean. That is the conspiracy with respect to the licensees, the external [fol. 549] conspiracy, if I may so call it. Then there is the internal conspiracy of which we are the victims, not the conspirators.

The Court: In which you are what we used to call particeps criminis of your own choice, and you can withdraw any time you want to.

Mr. Horsky: No, sir.

The Court: All right.

Mr. Horsky: The other charge in the complaint and the other charge which is dealt with in the 1941 decree and in the 1950 decree and which is proposed to be dealt with in this decree is the charge that the dominant members of this Society have misused their position in the Society to advantage their competitive position over the other members of the Society. That is the charge with which we are concerned today, and we are one among the other members of the Society.

[fol. 550] The Court: Mr. Dean—he is not impatient; he is very patient. Suppose we let him say what he has on his mind.

Mr. Dean: I did not know, your Honor, whether or not you wanted me to—

The Court: I think at times it is all right. You are not interrupting unduly.

Mr. Dean: I can break up my overall presentation and answer this very briefly now.

The Court: It might be better, if it is going to be a lengthy dissertation, just to keep making notes on your pad and hold yourself in restraint.

Mr. Dean: I didn't know whether you wanted me to respond after each point.

The Court: It would be preferable if you would wait unless I, myself, interrupt and ask you a question.

Mr. Dean: Very well, your Honor. Thank you.

The Court: Doesn't the proposed decree now broaden the basis of the distribution far more than at present?

Mr. Horsky: I would not say "far more," your Honor. [fol. 551] It broadens it.

The Court: More. In other words, "far more" is really a question of opinion. But we do agree that the proposed decree contains a method for a broader distribution than we presently have.

Mr. Horsky: Yes.

The Court: And to that extent it is an improvement, is it not?

Mr. Horsky: Well, when you say "improvement," your Honor, you suggest to me that we should take this up step by step and look at it without looking at the overall effect.

On the question of whether this is an improvement, I should like to say that I think it is on the whole a distinct step backwards rather than an improvement. Our understanding of the nature of this proceeding before you, your Honor, today is that you are to examine this proposed order to see whether it advances the purposes of the antitrust laws, whether it provides for carrying out the Sherman Act and the primary purpose of this consent decree which is before us, and whether it has cured the evils which the Government has pointed out to you.

[fol. 552] The Court: I agree with everything up to the end. I cannot say now as to whether or not this decree as it is now submitted to me is going to produce the maximum and the optimum result. I don't know. All I can say and all I am inquiring about is does this proposed decree improve the situation that presently exists? Is it designed to carry out to a greater extent the objectives of the suit than the present decree? Is there a fair expectation that this will work out all right? And are means provided whereby, in respect to which it does not work out all right, the Attorney General may apply to the Court for further action?

That is my inquiry to you as I see it, and I agree with everything you said up to the last phrase.

Mr. Horsky: Well, I think that I would agree with everything you have said except that I would emphasize one factor which I believe you did not mention. This decree which is being amended is your decree, is the decree of this Court. You have a certain amount of responsibility to see to it that it is carried out properly. I don't mean you in the sense of you, personally.

[fol. 553] The Court: That is something that perhaps you missed. It is my decree and it is not my decree. It becomes the decree of the Court. When I say mine I don't mean to speak in personal tones.

Mr. Horsky: I didn't either, your Honor. I meant this Court.

The Court: It is the decree of the Court once the Court's signature is placed upon it. But the Court's power to fashion this decree is by no means as broad as the Court would possess had the matter come before the Court after litigation and after judgment rendered by the Court.

This is a consent decree, and I either have to take it as the parties agree or reject it, and I have great difficulty in rejecting a proposed decree which I feel improves the present existing condition.

Mr. Horsky: I think, your Honor, that I would say, if you feel that you have lent judicial sanction to the continuation of a system which has been demonstrated before you to be bad, that you are doing a disservice to the decree of this Court and not a service to it.

[fol. 554] Let me read a sentence to you—

The Court: That would mean then, Mr. Horsky, to follow it out as I pointed out to you yesterday, if I rejected this decree we would have to continue to operate under the existing decree which contains manifest injustices and inequities, and the Antitrust Division would then have to make a decision:

'Shall we continue to operate under this decree which we know does not fully accomplish the purposes of our suit, or shall we depart from this consent decree and litigate this matter?

Would you have this whole matter litigated?

Mr. Horsky: No, sir. I think our fundamental disagreement is on what the state of the law is, and on that I would ask again that I be permitted to file with you a memorandum. But, briefly stated, I would believe that, if you rejected this decree, the Department of Justice would have no alternative but to come before your Honor with a decree which it believed did adequately meet the purposes of the antitrust laws and the purposes of the 1950 decree and ask that you approve those amendments to this decree. [fol. 555] The Court: I could not approve those amendments to this decree—

Mr. Horsky: Without a hearing.

The Court: —without a trial—without a trial, a trial—and that trial and the filing of that application would be equivalent to the consent by the Attorney General to vacate the 1940 consent decree and the amendment of 1950 and the whole matter would be without restraint of any kind until I determine.

Mr. Horsky: That is where we disagree on the law.

The Court: You don't have to prepare a memorandum on that. I will be persistent in what you believe to be my error. I have examined that question myself at great length.

Mr. Horsky: Very well. Let me call your attention to one or two other items, then, of the order which I think your Honor should know about.

Let me call your attention to a provision in the order which purports to put a 100 vote limitation on the vote of

any member of the Society. This is cited by the Government [fol. 556] as one of the restraints which is put upon the ruling clique and as a step forward. Let me find the specific provision. This is on page 9 of the proposed order.

"The votes of each member shall be calculated in accordance with the following formula subject to the limitation that no member shall have more than a hundred votes."

That I would say with due deference is a pure phony. It does not include the votes of affiliates, and all that it requires is that people who are members of the dominant group allocate their copyrights properly among their affiliated members and they will not have to worry about the hundred vote limitation.

[fol. 557] Let me suggest that I am not being unduly bold about my statement by reading to you what the counsel for the defendant himself says will happen under the new decree. This is the speech which has been filed with your Honor by Mr. Dean, and I am reading from page 36.

The Court: Which speech? The one out on the West Coast?

Mr. Horsky: No, sir, your Honor. The one in New York on August 27, 1959.

The Court: All right. I have it.

Mr. Horsky: Page 36 at the bottom of the page, your Honor. Referring to the dominant group that I have been talking about, he says:

"The 12 publisher members of the board of directors, including affiliated publishers, would initially have about 1505 out of a total of 4,908 publisher votes. This is a substantial reduction."

The next sentence.

The Court: This is a substantial reduction from 56 per cent of the votes.

Mr. Horsky: That is not the point I am talking to now. The next sentence, the hundred vote limitation, is what I am now addressing myself to:

[fol. 558] "Under the formula of the 12 publisher members of the board of directors, including affiliated companies, one publisher member of the board of directors will have 424 votes, one would have 393 votes, one would have 254 votes," etcetera.

The hundred vote limitation is a sham. It is a perfect illustration of the kind of a decree which this is. It purports to be something, and it really isn't anything. It purports to improve the situation. It leaves the situation just as it was.

The government says in its memorandum, and I am quoting from page 24 to you, "The vice of the system is that it gives these members in ASCAP who receive the largest share of ASCAP's revenues the power to elect the directors of the Society who in turn have the power to establish rules governing the Society's system of distribution which in turn determines which members shall receive the largest share of the Society's income." That is what the government says is the vice of the system. It remains the system under the proposed order. The dominant group still has control of the Society, and the vice which is pointed out in that memorandum has not been changed.

I think, your Honor, that I might make one or two general [fol. 559] observations and then I will close. I think I have trespassed enough on your time.

First I would like to comment very briefly on the suggestion made by the government that, if a system were devised that took the control of the Society away from this dominant group, they would resign; they would get out. There are two things that might be said about it. The first one is that one of them tried it in 1939 and stayed out for a year and came back. It was not feasible. But economically at the present time it clearly is not feasible.

Of course each tune has at least two and perhaps three people interested: The publisher, the composer and the author. If the publisher should leave, the largest publisher, the authors and the composers presumably might not be persuaded to go along with them. If any tune remains in the Society, the people who leave cannot license it to any-

one else. They cannot use it in any other licensing society. If they do, they lose all the revenue that they would get from the Society on the tune even though it is earning revenue in ASCAP. And under ASCAP's by-laws, which are not changed by this decree, if they should try to license it to another society, not only they but the publishers and [fol. 560] composers and authors, everybody connected with the Society, loses all revenue from that tune. I therefore say I don't think this is economically a reasonable threat.

Thirdly, I am not at all sure and my clients are not persuaded that, if the dominant group were to leave the Society, they would be worse off than they are now. The way the revenues have been allocated in the past has been so discriminatory and so unfair that it is impossible to tell under the present situation what the financial benefits or disadvantages would be if the group that has been mulcting the Society in the past should actually leave it.

The other thing that has been suggested is: Why don't we pull out if we don't like it? It is just as economically unfeasible for us to pull out as it is for the dominant group to pull out, for the same reason. But more than that, the clients that I represent, and I want to be sure that you understand this, believe in ASCAP, believe there must be a performing rights society. All they want is a society which is properly run, which is run for the benefit of all of its members, which is not dominated by a group which has stood in the past accused of misusing the Society for its own advantages.

[fol. 561.] They want it open, democratic, as the 1950 decree contemplates, a democratically operated society, and the suggestions we have made for a proper modified order are designed to bring that about.

Thank you, your Honor.

The Court: I promised to hear Mr. Schaeffer because he comes from Chicago, and after Mr. Schaeffer I think Mr. Fishbein and then Mr. Rothstein, Mr. Zissu, Mr. Niles, Mr. Kaufman, Mr. Battle and Mr. Bradford. All right, sir.

Mr. Redd Evans: Your Honor, were you reading the names of the people who will speak?

The Court: I was reading the names of those who applied yesterday for permission to be heard.

Mr. Evans: There were two names included there, sir. I came late, and the court stenographer took my name afterwards. My name is Redd Evans.

The Court: You did not make an application to me to be heard.

Mr. Evans: We gave our names to the clerk yesterday, sir. We came up here late.

The Court: You did not make an application to me.

Mr. Evans: It was impossible to interrupt, sir.

[fol. 562] The Court: Was that because you came late?

Mr. Evans: Yes, sir.

The Court: All right.

Mr. Evans: Thank you, sir. Will I be allowed to appear, sir?

The Court: I am going to see. Your name is what?

Mr. Evans: Redd Evans, R-e-d-d E-v-a-n-s.

The Court: And you represent whom?

Mr. Evans: I represent a group of small writers and small publishers.

The Court: All right. I will hear you at the end.

Mr. Freedman: Your Honor, the other name that was given with Mr. Evans' name was Guy Freedman, F-r-e-e-d-m-a-n.

The Court: All right, gentlemen, I am not going to have this go on interminably but within reason. I think 15 minutes ought to be sufficient for each one, not more than 15 minutes. I will give you a little longer.

Mr. Dean: If I am not mistaken, Mr. Evans' company is the Jefferson Music Company, Inc., represented by Mr. Horsky. At least their name is signed to the papers.

[fol. 563] The Court: Is that a fact, Mr. Evans?

Mr. Evans: Your Honor, may I explain this?

The Court: No, we are not going to interrupt now. When your time comes to be heard, you can explain it. I am not going to hear the lawyer and then the client, too.

Mr. Evans: May I be given the status—

The Court: Not at this time. I will hear you later on, and I am not squelching you. I will hear you later on, sir.

All right, Mr. Schaeffer.

STATEMENT OF MR. SCHAEFFER

Mr. Schaeffer: If your Honor please, may I first thank the Court for the permission to speak in this District Court. Having been admitted, of course, in the State of Illinois, the courtesy extended me to speak—

The Court: This is a court of the United States, and in my book, if you are a member of the Bar any place in the country, you are entitled to come in here and address the Court. There are some who differ with me, but that is my philosophy. So I am happy to have you here.

Mr. Schaeffer: Thanks very much.

I represent principally the publishers in the City of [fol. 564] Chicago, some 15 publishers altogether. They have become alarmed because of the fact that, without sufficient notice at least, the ABC network has been dropped, that is, the radio network, from the logging of ASCAP.

The Court: Is that your only objection?

Mr. Schaeffer: That is the objection to which I am going to address myself.

The Court: All right, sir.

Mr. Schaeffer: The first notice that we were given, of course, was that a speech was made by Mr. Dean saying that the logging would continue on the radio networks of ABC, NBC and CBS but that on the radio networks of NBC and CBS they would be the only ones to be logged. That would mean then that ABC would be taken on a sampling basis.

When I attempted to communicate with ASCAP to find out what the distinction was I received no response. So that I proceeded to do the only thing that was possible, to take it up with the Department of Justice, and in order to be correct in my position I discussed it not only with the antitrust attorneys in Washington but also in New York here.

[fol. 565] They of course would not furnish me any information, they said that certain information was restricted, and then I discovered that ASCAP had more classified information than the Government did. There was top information which was not disclosed.

The Court: I have always understood, and I know the Government has the right of access to the records of

ASCAP, that there is nothing confidential about it. In fact, I have had a number of interested parties communicate with me, I think one particularly, Mr. Cheyette—

Mr. Cheyette: That's correct.

The Court: And ASCAP as a result of my suggestion, not direction, suggestion, made available to his inspection all its records. ASCAP's records are not so confidential that you representing a member cannot go to them.

Mr. Cheyette: With leave, may I say what was supplied to me was a letter from ASCAP's counsel.

The Court: You got everything you wanted, didn't you? You didn't come back to me.

Mr. Cheyette: That's correct, your Honor.

[fol. 566] The Court: Therefore I assume you got what you wanted because my door was open to you.

Mr. Schaeffer: My position was a little different, because I addressed myself to the general counsel of ASCAP and was informed that this was a confidential information. I was informed by Mr. Dean yesterday that the contracts between the licensees are privileged, as it were, and part of the contract says that they are not to disclose any information because of competitive reasons.

The Court: You might want to have looked at certain parts which were by agreement to be kept confidential. May I say to you that all of these contracts with these radio stations came about as a result of negotiation and a hearing, fixing the royalty rates.

Am I correct, Mr. Finkelstein?

Mr. Finkelstein: That is correct.

Mr. Schaeffer: As an attorney I feel, as an officer of the court, that these figures could be disclosed to me so that I could make a satisfactory report to my clients at least that the basis on which they are saying now that this network is being dropped is because there isn't sufficient [fol. 567] revenue. But the statement is made that it is making less than some of the independent stations. However, in order to satisfy as many members as we have in ASCAP, if they are represented by counsel and counsel has informed—

The Court: If that is your only point, I think this was touched on by Mr. O'Donnell when he explained why this is

being done. However, I will permit Mr. Dean at this time to just make a brief statement which may satisfy you.

Mr. Schaeffer: Pardon me, your Honor, Mr. Dean did make a statement in the beginning that the logging would continue on the ABC radio but only for the purposes of sampling, as it were, to find out if there were any unidentified numbers. That is always a big problem. The only network that we have out of Chicago is the Breakfast Club which has been on for 26 years, and has an hour every day, five days across the board.

The Court: Which club?

Mr. Schaeffer: Breakfast Club. It was on from 8 to 9 and now it is on from 9 to 10.

The Court: In New York we have our breakfast a good deal earlier than that. In fact, we have it every day an [fol. 568] hour earlier than you.

Mr. Schaeffer: You become accustomed to it, as I have. The thing that disturbed them, the purpose of the whole proceeding, as I understand it, was to encourage small business to take care of the small individuals who in themselves have not great catalogs, and who are situated not in a locality such as New York or Los Angeles, where most of the networks send out their programs. Here we are limited to one chain broadcast.

In one fell swoop we are wiped out, as it were, as far as the daily logging. What the sampling will bring, I do not know.

I do say this, your Honor, I have spoken to the attorneys for the Antitrust Division. I don't believe they are in a conspiracy with ASCAP. I think they are trying to do the very best they can. I think that they have produced a beginning, as it were, and that I cannot say that I would be remiss to see this thing put into operation. The Court indicated that the time which was set forth for this thing to begin was a year or so. I agree with the Court it should start sooner than that, so we can find out and we can determine what the result is going to be.

[fol. 569] I have been assured by the Antitrust Division that they are going to follow this line.

The Court: I will say this, Mr. Schaeffer, to allay any fears you might have, that my personal observation of the

functioning of the antitrust law has been in every way eminently satisfied. I think they are manned by a very competent staff, very able and industrious staff, and a devoted staff. The head of the Antitrust Division of the Attorney General's office is a really dedicated man of exceptional ability, and he is doing a splendid job and has done a splendid job.

Mr. Schaeffer: He was very prompt in responding to my communications, and I have found my association with the Department has been one in which they are seeking information as well as I. I don't feel that we are going to be harmed to the extent of where those that are now in a position to take everything that they can will continue to do so. I hope with the aid of the Antitrust Division and with the order that will be entered here that these remedies or the improvements can be made.

[fol. 570] Thank you very much, your Honor.

The Court: Thank you very much.

Mr. Cheyette, Mr. Horsky spoke for you?

Mr. Cheyette: Yes.

The Court: Mr. Fishbein.

Do you want to speak a few moments?

Mr. Fishbein: It will be more than a few moments.

The Court: I did not mean to be too facetious.

[fol. 571] STATEMENT BY MR. FISHBEIN

Mr. Fishbein: I represent five publisher members of ASCAP. The applicants I represent respectfully submit that the provisions of Section IV of the proposed order, which relate to the manner in which the ASCAP board of directors shall be elected, are inadequate to achieve the antitrust purposes of this suit.

The Court: Is that the only provision that you object to?

Mr. Fishbein: I would have to come to the end of my memorandum by saying that I will speak only to the provisions contained in Section IV of the proposed order. However, it is not to be implied therefrom that the applicants approve all other provisions of the proposed order. I am not going to speak with respect to the other provisions except to say this, your Honor, that I agree with

Mr. Horsky that the control of compiling data for survey use must be placed in the hands of an independent agency as distinguished from the present board of directors.

The second point that I do not want to dwell upon is that I believe ASCAP is a public institution and all the records of ASCAP should be published for public use.

The Court: You don't mean to go that far, do you? [fol. 572] Mr. Fishbein: On that point, I will, your Honor. There isn't any reason why the public should not know how much money ASCAP collects each year and who receives that money.

The Court: I know, but that is a limitation to your statement. For instance, ASCAP has the right to go in and look at the books of its various subscribers.

Mr. Fishbein: I wouldn't go that far.

The Court: I knew you wouldn't.

Mr. Fishbein: I wasn't prepared to speak on that point, your Honor.

The Court: That wouldn't be right, to let ASCAP make public the records of its customers which may get into the hands of a competitor. All right, as long as we understand each other. We have to be careful as lawyers when we make statements that we do not make them too broad and too recklessly broad.

Mr. Fishbein: I appreciate the advice, your Honor.

Let me continue with Section IV. My clients further contend that Section IV of the proposed order does not insure a democratic administration of the affairs of ASCAP as expressed in Section XIII of the March 14, 1950, amended final judgment. Section IV does not as con- [fol. 573] templated by the said Section XIII give true representation on the board of directors to members with different participations in ASCAP's revenue distributions. The election of members with lesser participation in ASCAP's revenue distributions continues to remain dependent upon the weighted votes of the few members having large participation in ASCAP's revenue distributions. For all intents and purposes, those few members will continue to control the board by electing themselves and their designees, who must serve beholden to them.

Your Honor may ask me, what do my clients suggest in lieu of the said provisions of Section IV. I am prepared to answer that. In order to accomplish the antitrust purposes of the suit, any further amended final judgment that may be approved and entered herein, should provide, substantially, for three things:

1. For the purpose of electing the 12 publisher members of the board of directors, the publisher members of the Society shall be divided into an appropriate and specified number of classes; each of said classes shall consist of publisher members whose current performance credits (or revenues, as the case may be) received in the latest available fiscal survey year preceding it each election, shall within certain designated maximum and minimum limits [fol. 574] of said respective class; and each of said classes shall nominate and elect a specified number of directors (not necessarily the same) from within its own class; totaling 12 directors in all. And parenthetically I may add a similar provision, with a suitable definition of classes, shall be made for the purpose of electing the 12 writer members of the board of directors.

Now, class voting is a well established procedure and often used in organizations to give representation to various classes. ASCAP itself provides for its writer members as a class to elect 12 directors and for its publishers as a class to elect 12 directors. Class voting as proposed truly gives representation to members with different participations as expressed in the 1950 final amended judgment. Directors elected from lower classes no longer would be dependent upon the votes of the few members having large participations in ASCAP's revenues. Directors elected from one class would not and need not be beholden to members of other classes for continuation in office. Each class would nominate and elect the best qualified members in its class. A truly democratic representative and independent group of directors would result from class voting as proposed.

[fol. 575] Now, the government recognizes the need for democratization for the board, but limits any opportunity for more independent and greater minority representation

on the board to the restrictive and workable cumulative provisions of subsections (E) of Section IV of the proposed order.

My clients say, "Why stop there? Why not now for the first time really insure a democratic administration of the affairs of ASCAP by establishing the principle of class voting?"

After all, your Honor must remember that the small publisher and writer members are just as concerned about the welfare of ASCAP as the few publisher and writer members having large participation in its revenues.

For example, let us assume that four classes would be an appropriate number of classes for publishers. Let us further assume that that class number one would consist of publishers whose current performance credits in the previous fiscal survey year exceeded one million performing credits. Let us assume the second class consisted of 500,000 to a million performance credits; and that the third class from 200,000 to 500,000 performance credits; and that the fourth class had below 200,000 performance credits.

[fol. 576] We concede that those in class one make a greater contribution to ASCAP than those in the lower classes. However, if you were to allow one to elect a minimum of 9 directors of the total of 12, and the three lower classes one each, that certainly would not accomplish the antitrust purposes of this suit. However, there is a middle ground somewhere, and we do not say that each class should elect three directors. Why doesn't the government and ASCAP go back and reopen this proceeding and find that middle ground that will make a truly democratic administration of the affairs of ASCAP as contemplated by two prior proposed consent decrees, two of which resulted in decrees, now to the third now seeking to be made a consent decree.

My second point is that in addition to the 12 writer members and the 12 publisher members of the board of directors, there shall be two public members of the board; one public member shall act as a writer member director and one shall act as a publisher member director; the public members and their successors shall be designated

at or before each election of the directors of the Society by the then Chief Judge of the United States District Court for the Southern District of New York; and ASCAP shall provide for the payment of reasonable compensation to such public directors.

[fol. 577] Now, ASCAP is more or less a quasi public society. I believe Mr. Dean in his remarks conceded that. Admission to membership is compulsory. The use of music controlled by ASCAP is for the benefit of the general public. The public interest will best be served by the addition of public members to the board of directors. Only public members of the board would be free of the evil of dealing with themselves when voting for or against various proposals for the distribution of ASCAP's revenues among its members. Only public members would be free of self-interest and self-dealing, thereby enabling such public members to truly represent and protect the interests of all members of the Society.

My third point that we propose is that there shall not be eligible for election to the board of directors any representative from a music publishing company or business, either directly or indirectly controlled by a user of music.

A representative of a music publishing company, controlled by a user of music should not be permitted to serve on the board of directors, since such a director would be [fol. 578] acting for conflicting interests. The provisions of the 1950 final amended judgment, Section V(C)(5) and Section X disqualify members of the board from negotiating a license where the members have any pecuniary interest directly or indirectly in any motion picture producer or other prospective licensees, and we believe those provisions are now negative and wholly inadequate. They have outlived their usefulness.

ASCAP members are in competition with each other and no member must use the Society to obtain unfair advantage over the others.

All directors must be concerned solely with the welfare of ASCAP and seek to obtain the largest possible revenue for the use of its repertoire. More and more users of music have established and acquired and are continuing to establish and acquire music publishing companies. Such

music publishing companies are much more concerned with furthering the business interests of their parent user companies than with the publication and exploitation of songs for general public use. It is not difficult to envision [fol. 579] for the near future and the very near future an ASCAP board controlled by and replete with representatives of music publishing companies either directly or indirectly owned or controlled by users of music.

Historically, your Honor, prior to March 4, 1941, the Articles of Association of ASCAP provided that no co-partnership, firm, association or corporation shall have more than one vote or representative in the Society, and that the directors shall be elected at each annual meeting of the board of directors by a two-thirds vote of the entire board.

The first consent decree of March 4, 1941 provided that the Society shall elect the members of the board of directors by a membership vote in which all author, composer and publisher members shall have the right to vote for their respective representatives to serve on the board of directors, and that due weight may be given to the classification of the member within the Society in determining the number of votes each member may cast for the election of directors.

As a consequence of the 1941 consent decree, the first [fol. 580] one, the Articles of Association of ASCAP were amended so that one vote per member was replaced by basing voting rights on the amount of revenue received by the member in the previous calendar year. That is, \$20, per writer vote and \$500 per publisher vote. Although the members now elected the board, the antitrust purposes of the suit was not accomplished, inasmuch as the few members having large participation in ASCAP's revenue distributions, awarded themselves sufficient votes, under the weighted voting system devised by them, to reelect themselves and their designees.

In other words, despite the 1941 consent decree, the board continued to be a self-perpetuating one and the same few members continued to hold the power to elect all board members.

The Court: Mr. Fishbein, may I, without being offensive, but just as a matter of self-protection, show you as Exhibit 1 the original of your brief which you are now reading, and show you my underlining of it to indicate to you that I have myself read each word that you put in your brief and which you are now repeating.

[fol. 581] Mr. Fishbein: I am repeating it because your Honor said you wanted a town meeting of the air, and there are many, many members here who would like to hear what I have written.

[fol. 582] The Court: I want you to see that I have read it and you can go through each page and see my underlining.

Mr. Fishbein: I do hope you found it interesting.

The Court: I found it interesting because it presented your point of view, and your clients' point of view.

Mr. Fishbein: I will break away for just a moment, because I have listened with great interest to the colloquy between your Honor and the attorneys that preceded me. I have gained the impression that you have an "either or else" position in this case.

The Court: I think I have heard enough from you. You may sit down.

Mr. Fishbein: You are not permitting me—

The Court: I am not here to listen to your gratuitous remarks.

Mr. Fishbein: I beg your forgiveness, your Honor, I did not mean—

The Court: I am not here to accept comments by counsel.

Mr. Fishbein: Would your Honor permit me to explain the last remark?

[fol. 583] The Court: Suppose I say I prefer to erase it from my mind. Proceed now.

Mr. Fishbein: The point I was going to make, your Honor—

The Court: I have forgotten it.

Mr. Fishbein: I did not mean it that way, your Honor.

The Court: I have forgotten it. Proceed.

Mr. Fishbein: Although the members now elected the board, the antitrust purpose of the trust was not accomplished, inasmuch as the few members having large par-

ticipation in ASCAP's revenue distributions, awarded themselves sufficient votes, under the weighted voting system devised by them, to reelect themselves and their designees. Despite the 1941 consent decree, the board continued to be a self-perpetuating one and the same few members continued to hold the power to elect all board members. Apparently, the government did not anticipate the result of the weighted vote.

Despite a nine-year history of absolute control of the board by the few members having large participation in ASCAP's revenue distributions, the final amended judgment of March 14, 1950, again provided that due weight may be given to the classification of the member within [fol. 584] the Society in determining the number of votes each member may cast for the election of directors.

However, the 1950 final amended judgment did recognize that ASCAP's members are in competition with each other and that one of the antitrust purposes of the suit was to make it impossible for certain members to use the Society to obtain fair advantage over their competitors. Thus, it did seek to insure a democratic administration of the affairs of ASCAP and it did provide that the board of directors shall, as far as practicable, give representation to writer members and publisher members with different participations in ASCAP's revenue distributions.

Again, despite the 1950 final amended judgment, the same few members having large participation in ASCAP's revenue distributions continued to maintain sufficient votes, under the weighted voting system, to reelect themselves. In their discretion, they nominated and elected certain designees with different participation in ASCAP's revenue distributions. Needless to say, such designees could not be elected to the board without the weighted votes of those few members, and obviously had to serve beholden to them. Again, as with two prior decrees, the antitrust purpose of the suit was not accomplished.

[fol. 585] Despite a further nine-year history of absolute control of the board by the few members having large participation in ASCAP's revenue distributions, and it is conceded it was less than one per cent of the publisher members and less than five per cent of the writer members,

Section IV of the proposed order does not, and will not, correct the conditions that exist. The same few members will continue to control the board, in spite of the government's desire to limit the extent to which ASCAP may weight the votes of its members.

Could I call for a short recess, your Honor?

The Court: The only point I make is that I have read this brief of yours and I have marked it. I want you to see it with your own eyes. I read every word of this brief. You and I are not children. I am entitled by the reason of the office I hold, the office is entitled to respect. I know you did not intend to offend and I am forgetting it. I don't want to disturb you. We will give you a ten-minute recess and then counsel will resume.

(Recess taken.)

The Court: You may proceed, Mr. Fishbein. Take your time.

[fol. 586] Mr. Fishbein: I would like to conclude my remarks by just pointing out that after a further nine-year history of absolute control of the board by the new members, dominant members, Section IV of the proposed order again does not, and will not, correct the conditions that exist.

I say that the same few members will continue to control the board, in spite of the government's desire to limit the extent to which ASCAP may weight the votes of its members.

I say that the illusory provisions of Section IV will not change the complexion or character of the board.

I raise the question: What difference does it really make to those same few members if the votes are weighted on the basis of current performance credits rather than revenue received? Which, incidentally, is one of the changes made in the proposed consent order.

Is not self-evident that a lot of revenue means a lot of performance credits? Of what significance is the 100-vote maximum and the 10 per cent limitation set out in subsection (C) if those same few members will continue to maintain sufficient votes to elect themselves and their designees? What good does it do to provide for the nomination [fol. 587] of a member of the board by 25 or more members,

if the nominee cannot be elected without the weighted votes of those same few members?

Does subsection (E), which provides for the election of a director by a group of publisher members entitled to cast one-twelfth of the available votes, really accomplish anything? How will a smaller publisher member know the total available votes preceding an election? Or how many votes other smaller publishers possess so as to enable him to attempt to form a group comprising the necessary one-twelfth?

Assuming, without conceding, that such a group of competing, smaller publishers could be formed and could agree on the one to be elected a director, is it not quite apparent that a second and third group could not be formed to elect a second and a third director? If the antitrust purpose of the suit is to be accomplished and if there is to be a democratic administration of the affairs of ASCAP, we respectfully submit that the proposals made by us be incorporated in any new decree.

The Court: Mr. Fishbein, I would like you to do me a favor, to show you I personally like you very much, and I do. You are a very honorable and outstanding member of the Bar for many years. I received this communication [fol. 588] and perhaps you will read it, will you, so we may have it on the record. You are not necessarily subscribing to its contents by reading it, but the attorney who left it here has gone.

[fol. 589] Mr. Fishbein: (Reading:)

"Your Honor, I am Vincent Lopez and I wish to thank you for affording me an opportunity to address this Court on this most important matter.

"I have rarely appeared before a Court and have rarely voiced my objections and indignation against the inequities that arise during one's lifetime. I have pursued a path of least resistance due to my many musical engagements and time consuming business affairs. However, at this moment I must speak out and defend the rights of the American composers who have enriched the culture and life of our country. I am here to voice my opposition to the proposed modification of the ASCAP decree which is before this Court.

"I have been advised by my attorney that there are injustices in the new plan for modification under the heading 'The Survey'. I will not go into this phase, your Honor, in order to emphasize the greater injustice in Section 3 under the heading 'Distribution to the Writers'.

"The proposed modification would operate to confiscate from the writer members of ASCAP, as well as from their widows and orphans the revenue and security which they contracted for and to which they are entitled by reason of their creative genius. I am opposed to such confiscation and I urge this Court to refrain from putting its seal of approval on such an outrage.

"I am unfamiliar with the technical and legal ramifications of the proposed modification and as a layman and musician I consulted with my attorney who informed me that under the distribution plan presently in operation there was a graduated and slow diminution of receipts from ASCAP to a writer so that the writer or his estate could reasonably expect to receive revenues for the past performance or availability of his works over a thirty year period. Under the plan presently proposed the writer or his estate, and I again refer to his widow and orphans, would receive revenue for only three or four years and then be wiped out completely.

"The Department of Justice is asking this Court [fol. 591] and your Honor specifically to give judicial approval and sanction to this scheme to deprive the average ASCAP member of the revenues and security which are due him.

"After all most of the older writers sweat our years of low remuneration and have had a good percentage of their current performance money taken away when they were the most productive. This for the consideration of a later cushion. To take this away in a few short years is ethically wrong and would be a tragedy to those who have given up other means of making money in years gone by, banking on later security.

"Let the Current Performance Election remain for those new writers to choose if they wish, but, in the name of all that is fair don't take away the security of the other members who justly depend on the original premise of ASCAP—to provide some security for the long pull.

"I am very happy and proud to be a member of ASCAP but I respectfully urge that this decree be rejected by your Honor with the indignation it justly [fol. 592] merits.

"I thank the Court for this opportunity to speak out against this injustice and inequity."

That concludes the written statement, your Honor.

I, too, thank the Court for the courtesies extended.

The Court: Thank you for reading it for us Mr. Fishbein.

Mr. Zissu, would you now proceed.

Mr. Zissu: My remarks will be very brief, your Honor.

The Court: Mr. Rothstein, you are right, I skipped you and I will be back to you as soon as Mr. Zissu finishes.

[fol. 593]

STATEMENT BY MR. ZISSU

Mr. Zissu: We will rest on the short memorandum which we submitted, which concerns itself with the treatment of background music.

I speak probably for the largest numerical group of ASCAP members, some 142 composer members, comprising among the group the very well known composers of this country.

We see this proposed amendatory material is, far more than a pigmy step forward and we see no less the retrogression which it has been said will follow. We see in many areas great promise and we see possibly the thrust and the modern treatment of music and the ultimate giant step forward which operation in the future may well demonstrate it to be.

However, there are areas of controversy, such as the Court has already heard, upon which we need not express ourselves. I just want to limit my observations to the treatment of background music.

This point was gone into by counsel preceding me and I merely want to stress as to the aspect of differentiation,

meaning discrimination, your Honor, that nowhere in the [fol. 594] music market does this occur. When you buy sheet music, it doesn't bother you whether you are buying Tea For Two or something which is currently popular and may never become a qualified work. When you buy records, likewise. When feature performances are involved, likewise.

Then why in this area, when musical selections are being used in a background context for the same purpose and in the same fashion, should one composition receive favored point weighting greater compensation than another.

Surely, if Tea For Two is that great a composition which it is, and undisputably it is, it will receive not only these earnings of these various categories outside of ASCAP, as well as in ASCAP from feature performance, but even within the background use area, that frequency of use so that it will receive its due return.

What is possible under this decree is that the selection of inordinate taste, or value, by a Bernstein, by a George Anteuil, an Eli Seegmeister, serious composers of ASCAP, of the same duration, say 32 second, as against a popular song which can be fragmentarily recognized in terms of [fol. 595] 10 seconds? In one case that 10-second popular song when immediately recognized receives the full use credit and in the other case the superb symphonic music, perhaps, which the producer of the program has specially chosen as against Tea For Two, to serve his purposes in public acceptance, that will receive 1/20 of a credit.

Three minutes' use of the symphonic background selection would only receive one-fifth of a credit. The other in terms of 10 seconds work would receive 1/20. We say that is unfair and manifestly so.

With that I want to rest, your Honor.

Thank you.

The Court: Mr. Rothstein.

STATEMENT BY MR. ROTHSTEIN

Mr. Rothstein: The people I represent are opposed to Sections II and III of the proposed order. We believe that the provisions of these sections will very seriously restrict

and perhaps even destroy competition between the members of the ASCAP, and do violence to existing rights and obligations of the contract.

We believe that this order, the effect of this order, will be the creation of a master plan which will have the effect [fol. 596] of making payment certain to those dominant writers and publishers of the Society in the areas in which they now receive their greatest number of performances. That is the television commercial and sustaining network programs, and the radio commercial network programs.

We believe, too, that the proposed order will continue and will heighten the uncertainty of payment that is now the lot of the run of the mill publisher and writer, who must rely for the greater bulk of their performances on local station uses and sustaining network radio uses.

If our premises have any basis in fact, then certainly one of the underlying purposes of this entire litigation has been aborted. Since one of the main factors behind the institution of this action was the preservation of competition among and between the members of ASCAP itself, and in this light I would think it well to keep in mind that according to our estimates in every year there are over one hundred million performances of musical compositions on local radio stations.

Of that vast number, more than 99 percent of these [fol. 597] performances never appear on any survey previously conducted or that will be conducted under the proposed plan.

I had intended, your Honor, addressing myself as well to the security provisions of the proposed order, and I was anticipated by Mr. Lopez's statement, so I will limit my remarks on that point merely by saying that I agree wholeheartedly with what he told your Honor, and I will amplify his statements just a bit by making this observation.

When the writer became a member of ASCAP, he did so pursuant to contract. His acceptance or his subscription to the Articles of Association constituted a contract, and by the terms of that contract he agreed to an extended term of payment. Under this new plan, of course, this is and will be eliminated. The writer's money was withheld from him

for the purpose of this extended term of payment, so he might continue to receive payments for as much as 20 years after his productivity had ceased or his widows and orphans receive it for that period after he died and was no longer receiving performances.

However, this will all be eliminated under the proposed order.

[fol. 598] I submit to your Honor that this amounts to a certain confiscation of property without just compensation.

The Court: But the Court is not ordering this. The Society is coming in and consenting to it and if these individual members have a claim against the Society by reason of any settled agreement it is not being adjudicated here. I take it, though, when they did become members of the Society, they bound themselves subject to any modification that the Society might thereafter create by their vote, and that was the agreement they made.

Mr. Rothstein: That is very true.

The Court: That is the theory under which ASCAP now comes in and consents to it.

Mr. Rothstein: But the Court has a right to state to ASCAP that it may not properly do this.

The Court: That is far beyond my power. I cannot regulate the monetary obligations arising from any contracts that you say exist between ASCAP and its members. That is a matter for State Court litigation. I can only intervene so far as it contravenes and interferes with interstate commerce and contravenes present law.

[fol. 599] Mr. Rothstein: Since the Court has retained jurisdiction of the entire action and the decrees which have been entered, which deal in part with this very subject, if not in precise words with the substance of it, then it is certainly within your Honor's jurisdiction.

The Court: I retain jurisdiction, but that jurisdiction is limited by statute. That does not include the power to adjudicate upon any constructural relations that might have existed by reason of their own independent undertakings between ASCAP and any of its members.

Mr. Rothstein: Apparently ASCAP feels—

The Court: That is not my business. That is for them to determine themselves.

Mr. Rothstein: It is being submitted as part of this proposed order.

The Court: ASCAP comes in and says, "We consent to this." At least I anticipate requiring them to say that before I accept this decree, if I do accept it.

Mr. Rothstein: Very well, sir.

I wish now to address myself—

The Court: So if these widows and orphans—God forbid [fol. 600] I should take money from any of them, I constantly try to do my little acts of charity within my own limitations—if these widows and orphans are deprived of anything, it is not by action of either the Attorney General or this Court. If they are deprived of anything in which they have a vested right, they have their remedy at law in a state forum.

Mr. Rothstein: I wish to speak, sir, with reference to the treatment given in the proposed order on the performance obtained on radio sustaining networks.

Under the proposed order, there will be no payment whatsoever for these performances. That is, I repeat, a performance on a radio sustaining network program. It is proposed that these performances will be picked up and be reflected by the surveys of local stations as set forth in the Dean formula, and that payment will be made on that basis. That means, sir, and we have figured out, I will say in a rather loose mathematical way, because we do not have the precise figures, but our estimate is that perhaps one out of every 333 songs so performed will stand a chance of being picked up on a survey.

[fol. 601] The Court: Apparently your calculations differ with Dean's.

Mr. Rothstein: I will show you he agrees with me.

The Court: I know of your years of dedication to this entire industry. What we hope to do is to try out this system that has been devised by this specialist in the field, Joel Dean Company. Let us see if it works. If it doesn't, we will modify it and change it. Examine it every six months, see how it is functioning, and more or less by a trial and error method, not repeating the same error again, we make progress in life, and that is what is hoped to be done here.

Mr. Rothstein: We dispute the expertness of Joel Dean in this field.

The Court: I don't know who they are even.

Mr. Rothstein: We dispute and we do not accept his formula as that of an expert. We say seriously there is no recognized expert in this field, and there has never been a reliable survey in this field.

The Court: Perhaps experience will be the best expert [fol. 602] you can summon. Experience. Try this out. It is an improvement. It is an improvement on what you have.

Mr. Rothstein: There is an area of difference between your Honor and myself, because I do not consider this an improvement. I consider this a retrogression. In addition, I say, your Honor, if we must use the trial and error method, why must we obviously start with something that is manifestly wrong, unfair and inequitable? Why not strike that out at the very beginning and proceed with something that will perhaps give a better benefit of fairness to other members of ASCAP?

I would like to tell you why this is manifestly unfair and inequitable.

The Court: Very well.

Mr. Rothstein: Prior to 1956, ASCAP arbitrarily allotted 24 credits to a writer and 22 to a publisher for a network sustaining program use. Effective January 1, 1956, ASCAP just as arbitrarily reduced this figure to three credits. This was done without consultation with or even advance notice to the Department of Justice.

[fol. 603] We of course objected very strenuously to that and we even sought intervention on that point, as your Honor may recall. In opposing our intervention, the Department of Justice told us, "We agree with you as to ASCAP's action, we will look into, we will take measures to correct it."

The Court: At that time the Department of Justice was studying this whole situation.

Mr. Rothstein: I am not criticizing, your Honor.

The Court: They are honest, sincere in their efforts, they are competent and able, and they have given this great study.

Mr. Rothstein: I was not about to say anything in derogation of the Department of Justice.

The Court: Very well.

Mr. Rothstein: However, we do disagree with the solution that they arrived at with ASCAP. We must remember, too, there is some language in the proposed order and in the formulas evolved by the Joel Dean Association that payment to members will be somewhat in proportion to ASCAP receipts from different avenues of their licensees.

[fol. 604] Now, a network pays one license fee to ASCAP and that license fee is based on its total receipts from all types of programs, whether musical, news, sports, commentary or otherwise. There is no breakdown or allocation in its payment to ASCAP for commercial programs, sustaining programs or otherwise.

It pays this license fee to ASCAP in order to have the availability of the entire ASCAP catalog. Again, no breakdown is made in the catalog that so much money will be allotted to this particular musical composition and so much to that. The entire catalog is made available to the licensee and whether the licensee uses it once, not at all, or millions of times, the same license fee is paid.

[fol. 605] The Court: Mr. Rothstein, you would be surprised to see the diligence and the industry with which the ASCAP members are represented at these hearings which I held before me to fix these royalty fees.

Mr. Rothstein: I know that, sir.

The Court: I think that Mr. Finkelstein and Judge Pecora and those who come down representing the Society oftentimes are asking for far more than they should get, and yet they persist.

Mr. Rothstein: I am in accord with that. They should get it.

The Court: I mean the Society comes down and they don't surrender any rights of any of the members.

Mr. Rothstein: No, sir. I am not saying that.

The Court: They try to make the best deal they can and get as much as they can for the members of the Society. In fact, they persist.

Mr. Rothstein: And I am all for that.

The Court: I know you are, but at times they persist to such an extent that maybe I get aggravated.

Mr. Rothstein: This is not my implication, your Honor. I simply want to make the point that the network pays its fee to ASCAP regardless of use or non-use it makes of [fol. 606] the music.

The Court: That is the way they want it and they don't want the television people and the radio people—I've had them up five times now—

Mr. Rothstein: I am not quarreling with that.

The Court: —on the radio stations.

Mr. Rothstein: I have no quarrel with that.

The Court: And I told—well, I won't tell you what I told Mr. Finkelstein and Judge Pecora the last time they were in, but they might tell you confidentially.

Mr. Rothstein: Your Honor, I don't quarrel with that method of payment.

The Court: Well, I do.

Mr. Rothstein: Well—

The Court: All right. I want you to know that these agreements are ultimately made between ASCAP and the television stations and the radio stations and a group representing Muzak and background music, and they are arrived at after very competitive, arm's length dealings in which no side gives or takes any quarter.

Mr. Rothstein: I have no intention to imply otherwise.

[fol. 607] The Court: They are very able and astute negotiators representing ASCAP. I think that you should take cognizance of that fact when you speak of these contracts.

Mr. Rothstein: It was not my intention to imply that ASCAP did not collect enough money.

The Court: Maybe you would like them to collect more.

Mr. Rothstein: I guess no one here would quarrel with that.

The Court: Except the fellow who would pay it.

Mr. Rothstein: Except that person.

The Court: Let's get back, though. I want you to know that these agreements with the television people, with the radio stations, with all the other users are the best terms—

Mr. Rothstein: True.

The Court: —that real negotiators and bargainers were able to accomplish.

Mr. Rothstein: True, but my only point in bringing up those agreements, your Honor, was to emphasize that the licensee is paying for the availability of the ASCAP catalog, and he may not even use it, theoretically, but is still paying that license.

[fol. 608] The Court: You would be surprised. Some of them say they don't use it one-quarter of the time and they have to pay for it.

Mr. Rothstein: That's right. Therefore I say, if ASCAP collects its license fees based on the availability of its catalog and repertory, then certainly it should make distribution to its members based upon the availability of their compositions.

The Court: You miss my point. ASCAP collects it that way because that is the only way they can as a result of business dealings collect it.

Mr. Rothstein: That's right.

The Court: It is not as a result of their choice.

Mr. Rothstein: I think that point is immaterial. Whether it is their choice or not that is how it is being done, sir.

The Court: All right.

Mr. Rothstein: The radio network makes available to all its affiliates its sustaining program. The affiliates pay the network for the use of these sustaining programs. They may not use it, but the fact is that these programs are piped to every station in the chain for its use and availability, and the music of ASCAP is being made available to all these stations. Therefore I say, to eliminate payment for a sustaining network use is an unrealistic approach to this.

It has been argued here yesterday that the reason why this is done is that it is impossible to ascertain the number of stations in a network that actually carry the particular sustaining program. If that is the basic reason for this elimination in the proposed order, this is not a fact. It is not a fact. We have ascertained through information received from network officials that this is a very simple matter to be done. It is not only an easy matter to be

done; it can even, if necessary, be required in the license agreements between the parties involved, just as your Honor required Muzak to log its numbers to ASCAP.

The Court: Muzak is a different proposition. I have had the experience of having the representatives of these television and radio stations present at a negotiating table, and I really feel it is not part of judicial duties but it has been thrust upon us, and I know how reluctant both of these enterprises are to furnish programs of each piece and over each station and how they object to ASCAP going in and looking at their books and examining their books and finding out what they get.

[fol. 610] That has been one of the bones of contention that Mr. Finkelstein has been trying to get for a number of years complete and unrestricted access to these books by the accountants, and that is one thing that they have been constantly resisting.

Mr. O'Donnell: May I ask a question?

The Court: Yes.

Mr. O'Donnell: I don't think I heard counsel correctly. May I ask if he is contending to the Court that no payment is to be made for any music that is played on sustaining programs?

The Court: No. He does in one breath, but then he pulled it back and he corrected it. He correctly stated it.

Mr. Rothstein: I said that it is proposed that these performances will be picked up and reflected on the local surveys.

The Court: You correctly stated it.

Mr. Rothstein: And coming to the local survey, the survey of the local stations which is proposed in the amended order, according to the Dean formula, we believe that this is a most inadequate and inequitable system which can only be destructive of competition, and I again ask your Honor to bear in mind that one of the purposes of [fol. 611] this action was to preserve and foster competition between the members of ASCAP itself, and I say that this is destructive of competition for this reason:

The great bulk of small writers and publishers can only look for their performances on local station programs or sustaining network programs.

The Court: Let me ask a question, Mr. Rothstein, because you have appeared before me a number of times in these ASCAP matters and you have contended that the present decree did not afford the full protection it should.

Mr. Rothstein: Yes, sir.

The Court: That has been your consistent position,

Mr. Rothstein: That's right, sir.

The Court: Do you feel that this proposed decree now is an improvement?

Mr. Rothstein: No, sir.

The Court: You do not. What would you have the Court do, reject it?

Mr. Rothstein: Well, your Honor stated yesterday and, I think, this morning as well that you must either accept or reject it, that it is not within your province to re-[fol. 612] commend—

The Court: I cannot dictate compromises, and that is what this is, a compromise.

Mr. Rothstein: Yes, sir. My own feeling is, sir, that the government may properly present a petition to your Honor for a modification of the decree and your Honor may take testimony only with reference to such proposed modification and need not open the entire case.

The Court: I believe that that is not so. Once you take a settlement, and that is what they did by the consent decree, you either abide by that or you get a further consent decree or you have the consent decree set aside and proceed then to try the lawsuit. That is a basic principle of law which is applicable to antitrust suits as well as all other forms of litigation.

Mr. Rothstein: You are asking me in effect whether I would, if there was no alternative, suggest that the case—

The Court: There is the other alternative of having a trial.

Mr. Rothstein: Yes, sir, if that would be my choice.

The Court: Yes.

Mr. Rothstein: And it seems to me, sir, that rather [fol. 613] than perpetuate what is basically an illegal setup and situation which cannot apparently be modified to the satisfaction of the parties concerned, this may perhaps be the only alternative.

The Court: Do you realize that that perhaps may result in an order of dissolution?

Mr. Rothstein: This is very possible, sir, and I think that I could recommend an alternate solution which can obviate that necessity.

The Court: You would be better than Solomon, and he is dead for a long time.

Mr. Rothstein: I am stating this, your Honor, of course, in the context of my own perspective.

The Court: I tried in the past six or seven years, I think it is, that I have had this matter to find out some way that I could suggest that would solve this so that I wouldn't have to devote at least four weeks a year to these ASCAP matters as an umpire, referee, business arbitrator and business czar. It is not part of judicial duties and it is not satisfactory to me by any means. I have not come up with any solution. I don't know what is better than what we have. I don't know of any remedy.

Mr. Rothstein: I have always believed, and if I am [fol. 614] correct in this belief I don't know whether it will call for your thanks or for you to berate me—

The Court: I won't berate you. Mr. Rothstein, I try not to berate anyone.

Mr. Rothstein: I say this in a jocular sense purely.

The Court: I may seem to do so because of my Celtic nature.

Mr. Rothstein: But I have always believed that the several intervention proceedings I filed in 1956 were the direct cause of having this case assigned to your Honor. I may be wrong in that, but that was my impression at that time.

The Court: Are you the fellow, then, to blame? If you were younger I would think you were a juvenile delinquent. All right, let's get back now.

Mr. Rothstein: This is the way I would solve the situation, and I think my solution would take this entire thing out of the realm of the courts and it would never be a burden to the courts again except with respect to such matters as might incidentally arise from time to time in the operation of any organization.

My solution is the per use per selection basis of payment, a hundred per cent payment for a hundred per cent [fol. 615] use. If your song is used, pay for it. A song is a property right. It is a commodity.

The Court: Yes, but—

Mr. Rothstein: We can do it. We can do it. Please hear me out, your Honor.

The Court: But it will cost you more.

Mr. Rothstein: I disagree and I am going to show you that it is wrong.

ASCAP has always insisted that this is absolutely impractical; the cost will be prohibitive. I have never known, nor have I ever been able to obtain any information as to what efforts ASCAP or anyone else ever made to determine this.

We, ourselves, recently approached several large corporations in this country that are experienced in assimilating data with the use of electronic equipment, and only recently, under date of October 15th, we received a letter from the Burroughs Corporation which is one of our largest. Please remember that they are acting on the information we gave them, not that ASCAP gave them. But they tell us in their letter, and your Honor might be interested to see it, that on the basis of processing 300,000 song performances a day they figure a yearly cost of only \$828,844, and if this is anywhere near accurate it is certainly not so prohibitive a cost that ASCAP cannot undertake it and do justice to every songwriter and publisher member.

The song, I said before, is a property right. The man produces it. It is used. He should be paid. He is entitled to payment. He is not entitled to have to gamble on a 333 to 1 shot.

The Court: Doesn't he create this gamble, if it exists, by reason of his own act?

Mr. Rothstein: No, sir, and I will tell you why. Because you said yesterday—

The Court: He doesn't have to be a member of ASCAP.

Mr. Rothstein: Exactly. I am just coming to that. You said he can resign. Certainly he can resign. You put that question to various experts and they gave you various

reasons why he could not resign practically. I will give you another reason which to my mind is the most important reason why he cannot resign practically.

That is because of the blanket license, because if I as a member of ASCAP resign from ASCAP and take out my 2 or 22 or 52 songs I cannot compete as an individual against the use of the blanket license which is peddling [fol. 617] hundreds of thousands of titles for one fee. I cannot compete. That is why the man cannot resign. I say to you, your Honor, and I believe this very—

The Court: Wait a minute. Hasn't ASCAP got competitors now? Isn't SESAC a competitor?

Mr. Rothstein: Still using a blanket license.

The Court: But they are a competitor.

Mr. Rothstein: On a very minor scale.

The Court: Isn't Broadcast Music a competitor?

Mr. Rothstein: In only one sense. They are essentially an organization for publishers. Out of a \$10,000,000 annual income all the writers in Broadcast Music get a few hundred thousand dollars in distributions. The writer members of Broadcast Music have no standing whatsoever.

I also say to your Honor that in my opinion the root of all this trouble, essentially the reason for all the internal dissention and squabbling in ASCAP and the only reason why we are here today and why we were here yesterday is because of the internal trouble in ASCAP which lies in the blanket license because the fees are collected on that basis.

The Court: I am not going to hear you on that. I think I have given you enough time. I will read your brief. [fol. 618] Thank you very much.

Now Mr. Niles. I would like to hear everybody in opposition this morning so that I can hear Mr. Dean at 2 o'clock.

STATEMENT OF MR. NILES

Mr. Niles: I don't want to talk long, your Honor, but I don't want to talk under any misapprehension because I am not attacking this decree.

The Court: Are you speaking in favor of it?

Mr. Niles: I am perhaps in the wrong gallery.

The Court: All right.

Mr. Niles: I am speaking in favor of signing it. I am speaking from the angle of seniority and the current performance.

The Court: Come over here, Mr. Niles. Whom do you represent?

Mr. Niles: I represent Handy Bros. Music Company which is a fully owned corporation of the W. C. Handy estate.

The Court: All right.

Mr. Niles: I represented Mr. Handy and his company from 1925—

The Court: He appeared before me several times as a witness. He was a great musician and he was blind, was he not, for some years before he died?

[fol. 619] Mr. Niles: Yes, in his last years.

The Court: He was a witness, and we all had great respect for him. All right.

Mr. Niles: And what I would like to say is approximately what I think he would have wanted me to say.

The Court: Then you say it. I think everybody in the industry had great respect for Mr. Handy. He was a great musician and a good man. You say what you have in mind.

Mr. Niles: The beneficiaries of the trust under which the stock of his company is held are his widow and his children and his brother and sister.

He was an intensely loyal member of ASCAP. He felt at all times that, far from discriminating against him as a negro and as a small fellow in the publishing world, he had gotten an even shake in ASCAP. He supported ASCAP and his company did as far back as the '20s when ASCAP was not in as secure a position as it was before the government got after it. As far back as the '20s I could hardly induce him to sign a contract, anything short of a lease, unless it had something in it about being subject to the rights of ASCAP which are to be respected.

I don't think that any question that has been raised here [fol. 620] is as vital as that of getting a decree signed that will let ASCAP live and continue to do for publishers and writers, both great and small, what no one of them can do

for himself. That is not to say that they have no alternative but ASCAP. They can form other associations. But that takes work and application and brain power. That can be done. It has been done.

I want to submit that the idea is incorrect that the only fair distribution system under which an organization such as ASCAP can function is one based purely on current performances or, let alone, on separate payment for every use to cover everything. I cannot cover all the ramifications of that, but I am experienced as a musical historian and I know something of the musical history that bears on that subject and particularly the seniority provisions of the consent decree.

W. C. Handy, as is common knowledge, was the first to introduce the form of negro folk music to the public which he did with the Memphis Blues written in 1909 and published in 1912, followed by the St. Louis Blues and many others. He was not only the first to introduce that form, but except for him the blues idea might not have become [fol. 621] known at all. These were songs of a different kind from any that preceded them. It was not only in the overall form, in the 12 bars and the 3-line verse and so forth; it was in details of harmony, it was in the blue note, it was in the use of the grace notes and other things that have become a part, a large part of popular music and one of the largest parts of jazz since then, as people of the stature of Mr. Gershwin have acknowledged.

There is a real debt today to Mr. Handy because of the current music which now accounts for ASCAP's income. is in large part based on the foundation which Handy built, and the same could be said of Irving Berlin with his influence on ragtime.

The Court: I think, Mr. Niles, we all join with you in paying tribute to Handy. He was a great musician.

Mr. Niles: That is no what I am trying to do, your Honor, now. I am speaking about Irving Berlin.

The Court: Irving Berlin, too, was quite active. But do I understand now on behalf of the Handy estate that you ask the Court to approve the proposed decree as now submitted?

Mr. Niles: You do so understand, but I was offering a [fol. 622] reason for it, and I will forego any further praise of Mr. Berlin or Mr. Handy or Mr. Gershwin, but I would like to say a few more words.

The Court: You can take that as being undisputed facts in the record. Now, if you will give me your reasons, I would appreciate them.

Mr. Niles: I say that these writers should have credit not only for the income which is directly brought in by their works but for most of the income from most of the songs written in their categories since they burst on the scene. Their work has been getting rewritten ever since they started writing. They started styles which have increased the popularity of popular music and have increased the income from popular music.

So it is not true in any substantial sense to say that the seniority funds that are involved in this decree give any writers or publishers more than their works have earned or cut them into anybody else's income.

These fees that come into ASCAP, as has been pointed out, are not on a piecemeal basis. They are lump sum fees for access to the entire catalog, and no amount of mathematics can determine the amount of money which is brought in by any individual use.

The famous songs of years past that are controlled by [fol. 623] ASCAP are a major selling asset in fixing its fees, and so are the names of the publishers and the writers whose songs they use. And the 1959 or the 1960 group of songs, regardless of how often they may be used in the first few months and possibly thereafter, is a negligible asset in bringing ASCAP's contracts into being.

There is, therefore, no basis for any claim that the current performance system is the only one that can give the member the equivalent of his own contribution or avoid robbing Peter to pay Paul. It is the reverse.

I think that violence is done to the principle of seniority in the proposed decree, especially in the case of publishers. I hope in the future it can at some time be remedied as the results become apparent.

I don't like to tell you that I don't think they are just, but I do not seek to sacrifice the reaching of a decree to the

interest of my clients as are involved or would be furthered by knocking those or throwing the baby out with the bath.

The Court: Or out of the window. Thank you very much, Mr. Niles.

Mr. Niles: Thank you.

The Court: Mr. Kaufman.

[fol. 624] STATEMENT BY MR. KAUFMAN

Mr. Kaufman: If it please the Court, I think there has been a good deal of pro and con and I am not going to belabor any one point, just make some observations.

Firstly I think we should realize what is the most fundamental concept of the Society. It is merely a collection agency and as such we advocate that this proposed decree is inequitable in that it proposes again to pay for availability. As a collection agency we should be paid per performance.

There are some improvements, so to speak, but only on paper, if it pleases the Court. One-twelfth of the votes can elect a director. But does the average member have available to himself the records of the Society so he can meet with the other members? Some of us have tried to get records from the Society. As a matter of fact, in Mr. Dean's speech before a membership committee he states that such records will be available if it is properly sought. Who is to determine whether it is properly being sought?

The Court: Me.

Mr. Rothstein: I appreciate that, Judge. Going back a period of about eight months one of my clients made an application to the classification committee and to this date [fol. 625] he has not had available to him an inspection of the records without an application to the Court, of course. Why? Because we have been confronted specifically with "What do you want?"

The Court: The trouble is this, and let's be frank about it: ASCAP has had certain competitors enter the field. In order to protect ASCAP and its members from those competitors who have at times associated themselves with members of ASCAP and former members, ASCAP has had to zealously guard some of its records as a matter of protection to its own members. That is the fact.

Mr. Kaufman: Generally that is so, your Honor, but where an application is made by a member of many years' standing—

The Court: No application was made to me that was not heard. The only one was Mr. Rothstein's, and he wanted to intervene, and I felt at that time, and I was assured by the Attorney General, that this matter was receiving their study and their attention, and it was, in fact.

I said, "Mr. Rothstein, I won't permit you to intervene. You have no standing here. Besides the Attorney General is investigating this matter."

[fol. 626] But if you have a legitimate inquiry and your client wants some information as to ASCAP, it is not a secret organization in so far as its members are concerned except in so far as it must be secret for the self-preservation or for the protection of those who pay them fees.

Mr. Kaufman: But what can be secret if a member objects to his classification and tells me "On what do you predicate my classification? Give me the recording that you have logged. Give me some information on which you base it."? Unless we can give them specific data which we don't know yet—

The Court: Did you make a complaint to the Attorney General?

Mr. Kaufman: No, sir, we did not.

The Court: They have the right to go in and inspect the books of ASCAP under the existing decree, and they would have done it had your complaint had any merit to it. But you didn't give them the opportunity.

Under the present decree, under the proposed decree the Attorney General, functioning through the Antitrust Division, has the right of access to these books and records.

Mr. Kaufman: That would mean that we would have to [fol. 627] have the government and the Court be a permanent watchdog to protect our rights. If we can't get from our own association—

The Court: If you feel that you have been deprived of your rights, the government in its Antitrust Division is supposed to be the watchdog once a decree has been entered.

Mr. Kaufman: All right. But we can anticipate what is going to happen. The proposed decree says that every mem-

ber shall have the right to inspect the records. Yet, reading on page 39 of the message sent out by the Society of a speech made by Mr. Dean, it says "Any member or his authorized agent will be permitted to inspect such lists and such records with respect to his own compositions. Other portions of such lists and records shall be available for inspection by any member or his authorized agent to the extent that inspection is sought in good faith."

Who is to determine that? Only the powers in being.
[fol. 628] The Court: Their decision is not final on that.

Mr. Kaufman: Then we have to make an application to the Court.

The Court: No. You go down to the Attorney General. You can go down to the Attorney General, the Antitrust Division. You just write them a letter. In fact, they have an office right here in this building.

Mr. Kaufman: Again I say, your Honor, that we seek compensation for performance and not because anyone has a catalog that may be available.

To draw upon your own analogy, just because we seek to buy a serge suit that may be in stock or is generally kept in stock doesn't mean that a premium is paid for that suit, that more is paid for a blue serge suit than for a green cheviot. They are all available and we buy what we want and pay for what we buy.

We object to the decree, Judge. I don't want to belabor any more points. Thank you for the opportunity to speak.

The Court: Now, Mr. Edgar Battle and then Mr. Perry Bradford.

[fol. 629] STATEMENT BY MR. BATTLE

Mr. Battle, you are not a member of the Bar, are you?

Mr. Battle: No, sir.

The Court: All right. I will hear you. It will be refreshing to hear from a layman. But you are not going to read that entire book, are you?

Mr. Battle: No, sir.

The Court: All right.

Mr. Battle: I just have a couple of points that I would like to talk on.

The Court: All right. Take your time now.

Mr. Battle: Your Honor, I beg for you to bear with me because this is only the second time in my life I ever appeared before a judge in a courtroom.

The Court: Don't make any statement against your interests and disclose the other occasion.

Mr. Battle: I know absolutely nothing about the legal language.

The Court: This is a United States court and you feel right at home. You tell us what you have on your mind. Take your time.

[fol. 630] Mr. Battle: First I would like to talk about the survey and I would like to offer myself as a specimen. I don't think that this survey in this new decree is going to remedy anything. I think it is going to be worse than it was in the last decree, and I will tell you the reason why.

I happen to have had one of the biggest hit songs in the country last year.

The Court: What is the name of it?

Mr. Battle: Topsy.

The Court: Might as well give it a plug.

Mr. Battle: The name of the song was Topsy. Part I and Part II.

The Court: By whom was it published?

Mr. Battle: I was the publisher, one of the writers and the publisher.

The Court: There are so many people here; otherwise I would ask you to hum that for me.

Mr. Battle: If you ask your grandson, he will tell you all about it.

The Court: I will.

Mr. Battle: Because it had a drum in it and he was whamming all the way through it.

The Court: All right.

[fol. 631] Mr. Battle: I sought out some expert advice, because I am not a mathematician. I am simply a music writer. I wouldn't be a publisher if I had got publishers to publish my stuff. But I had to publish it myself.

My expert advice was that they think this song had in excess of a million performances. ASCAP gave me credit for 400. I can show you that in black and white. For a

million uses they paid me, through their survey, for 400 performances. That was pretty bad. But this new decree is going to pay me even less because I would get paid by way of WABC or the American network which I won't get paid any more.

The Court: Do you have any other songs, Mr. Battle, other than Topsy?

Mr. Battle: I have about 200 songs in the catalog of ASCAP some of which they published and some that I have, myself, but about 200 copyrights at the present time. I have many more songs but that is all the copyrights I have.

The Court: You make this your profession?

Mr. Battle: Yes, sir, and they are trying to make it not [fol. 632] my profession. The way I see it they are putting me out of business.

I joined this organization because, after reading about how the organization was founded and what the Honorable Victor Herbert had in mind in gathering these people together to foster this organization, I thought it was a wonderful thing and I put all my time and effort into it. Many of the people here can attest to that. I even have had the honor of writing a song with the present president of this organization. I feel that I have given an awful lot to this organization. I don't feel that I should be treated in this manner. They are not only treating me this way—

The Court: How are you going to be worse off under the new system?

Mr. Battle: Under the new system, your Honor, they say something about a random survey. Well, this random survey is just making another random survey, a bigger random survey. So what they did was they took a whole and added one-half to it; so, if I got 400 now, I couldn't possibly get any more than 600 performances on the next survey. But I don't see where it solves anything because [fol. 633] then they dropped out half of what you got now. That is how it looks to me.

I want to tell you, I am not a mathematician, I can't figure these things out, so I went and got somebody who was, and they told me that the least amount of credits that I should have gotten was somewhere around 360,000 or

something like that, and that is based on one performance a day over the period which they paid me for each station.

When a song becomes a hit in the United States these stations bang it death.

The Court: And don't I know it.

Mr. Battle: And that song is not played only once a day. It is played, I'd say, at least five or six times a day.

I want to bring out that I am not arguing here just for myself. I think they gave me a very low amount of performances. I thought they should have given me a better deal than that. But I am arguing for the other fellow who stands on the corner with me in front of the building, who writes these songs and gets a hit, too, and gets the same treatment, and it is very unfair, and I don't think that this consent decree is doing anything about it.

[fol. 634] Now I would like to talk about the distribution. My friend Bob Davis wanted to speak about this and you told him that I could speak for him. This is the area that he wanted to talk about, and I will be voicing my opinion as well.

The Court: All right.

Mr. Battle: In distribution, I have heard it argued here and I have learned a little bit about it. I must say I know much more now than I did before because that thing that they sent out to the writers was so complicated that I don't understand it and none of my friends that I have talked to understand it either.

But we understand one thing, that the way the moneys are distributed, within three years we are going to be nowhere. We are nowhere now, but we are going to be further nowhere because in three years everything that I worked for for the last 25 years is going to disappear, and that is not only for me but for the widows and orphans, too.

The first time I ever stood up in an ASCAP meeting in my lifetime was the last meeting, and I stood up to argue for friends that I have written for that have passed on. [fol. 635] Their wives and children are depending upon ASCAP and the moneys that they received and the moneys that they are receiving and would keep expecting to receive. But they, too, are going to be in the same boat as me and in three years they are going to be further nowhere.

I spoke to Judge Pecora and Judge Pecora told me that the Justice Department wouldn't allow that. I would like to ask you a question, Judge.

The Court: You mustn't ask judges questions. But you go ahead, Brother-Battle.

Mr. Battle: I will make a statement, then.

The Court: All I want to tell you that when you decided not to study law the Bar lost one of its shining members. My goodness, what you couldn't have done in front of a jury. You could have had them in tears and taken care of all the widows and orphans in those cases you could have tried. You should have studied law.

Mr. Battle: This is what I would like to say, Judge.

The Court: You can ask me a question. Why not? Go [fol. 636] ahead.

Mr. Battle: You are sitting here on this bench and performing a service for the American people.

The Court: I have been trying my best to do that.

Mr. Battle: Yes, sir. Now how would you like, after you have sat here all these years and you have come to retire, to have them tell you that you have no pension? I don't think you would like that.

The Court: You know, I gave up a pension to come here to sit here.

Mr. Battle: I just tried to say—

The Court: I appreciate your point, and I expect Mr. Dean to make a note of it. If you will be here this afternoon, we will listen attentively to what he says. I think that you are speaking from your heart.

Mr. Battle: Yes, I am, sir.

The Court: And you are entitled to have a special response made both by Mr. Dean and by Mr. O'Donnell. If you will come here this afternoon, we can both pay attention to what Mr. Dean has to say about that, and then I may let [fol. 637] you say some more.

Now we will hear from Mr. Bradford.

Mr. Battle: May I say one thing more, Judge?

The Court: Yes, sir.

Mr. Battle: I can't read that chart over there, and I don't know what it is all about, but I would like to say one

thing as far as foreign. I heard them talking about that here.

I was in the service of my country during the war as a War Department civilian overseas. I was a musical director for morale purposes. I played in many foreign countries. Everywhere I played the societies of those countries demanded that I put down every number that I played, and those numbers were paid for. I don't see why this Society couldn't do the same.

Thank you, your Honor.

The Court: Thank you.

All right, now, Mr. Bradford, you step up. Your name is Perry Bradford?

STATEMENT BY MR. BRADFORD

Mr. Bradford: Yes, sir, Judge.

I am here by being careful. Judge, I want to ask you one question.

[fol. 638] The Court: You want to ask me a question?

Mr. Bradford: Do you see that gentleman sitting there, Mr. Fishbein? I want to ask him one question. Can I ask him?

The Court: All right. This is part of the routine, is it?

Mr. Bradford: This is something that I want to ask him.

The Court: Mr. Fishbein, do you mind having Mr. Bradford ask you a question?

Mr. Fishbein: I may refuse to answer, but I don't know what the question is.

The Court: This is not testimony, gentlemen. This is just colloquy.

All right.

Mr. Bradford: We see here a Festival of American Music presented by the American Society of Composers and Authors in 1914. This was held in 1939, Judge.

The Court: 25-year anniversary.

Mr. Bradford: That's right. In this book or program I see here where seven music companies own my four catalogs. When they got down in court, when I sued them for six million dollars, which I didn't get nothing, his [fol. 639] lawyer—he didn't appear—

The Court: This isn't a question.

Mr. Bradford: I want to ask him: Why did he get down in court and say you only own 39 songs when they have my four catalogs here in the book.

The Court: I will rule that question now as being immaterial and irrelevant.

Mr. Bradford: All right, sir. I accept it.

The Court: Let's come down now to what we have in hand here on this decree. You want to be heard, and you were given an opportunity to speak for five minutes.

Mr. Bradford: All right, Judge. You see, I started the first colored songs on the records, "Namely Smith" in 1920, "Asbestos Smith" in 1922. Louis Armstrong was playing and I was singing. I had the blues and the record business tied up like this. He knows it. He knows it. I had it tied up like that.

I was working for Columbia at that time, Columbia Record Company.

The Court: Columbia Gramophone Company in those days.

[fol. 640] Mr. Bradford: That's right.

The Court: On 59th Street on the Circle.

Mr. Bradford: That's right. But, you see, it was downtown on 34th Street first and then they moved up.

The Court: That was later. That was after my time. Go ahead now. Tell us about this.

Mr. Bradford: So I went to this fellow—he took my catalogs, my four catalogs. He loaned me \$300 and he was to go and collect my money in Europe, not here. So he takes all of my catalogs, my four prior catalogs. He loaned me that money on 39 songs, but he takes my four catalogs and put them in ASCAP.

[fol. 641] So I wrote to ASCAP, begged them. Mr. Finkelstein and none of these fellows was there at the time. But there were four gentlemen there.

The Court: Mr. Bradford, what it seems is that you only have some personal matter here that really is not for the Court.

Mr. Bradford: Here is what I says. In 1956, Judge, I was refused six times in ASCAP, six times, but they take my songs and put them in ASCAP. I was no good.

The Court: You have a remedy if you haven't waited too long, and that is to go and see a good lawyer and start a suit. You have a lot of good lawyers here.

Mr. Bradford: But in 1956, after they have taken me and knocked me all around, I signed an application and they refused me, and do you know what they are paying me? \$3.45 a quarter.

The Court: You are a member today, aren't you?

Mr. Bradford: Yes, sir, for \$3.45 which I don't think is fair, Judge. These fellows have taken my songs all these many years, and they have suffered me and given me a lousy \$3.45. I don't think that is fair.

The Court: I wouldn't describe the \$3.45 in that fashion. If you feel aggrieved, you go and see a lawyer or, if you go [fol. 642] and see Judge Pecora, I am sure he will try to look into your case and see that you get every dollar that is coming to you.

Mr. Bradford: I will be there. The Judge is all right. Thank you very much.

The Court: Mr. Redd Evans.

STATEMENT BY MR. EVANS

Mr. Evans: Your Honor, I want to thank you for your graciousness in allowing me to speak even though I am here for one of the firms of which I am a member as counsel. I feel that it will serve no purpose to speak at this time because most of the people who have spoken have very well presented my particular viewpoint, and the only thing that I could possibly do would be to reiterate the same point of view with indignation. I would prefer not to speak.

The Court: What particular proportion of the proposed decree do you want to register your objection to?

Mr. Evans: I would like to say, your Honor, and please forgive me because I seem a bit emotional about this because you have just seen—

The Court: You go ahead now.

Mr. Evans: Very well, sir. I would like to say that there is not one portion, not even one portion, of this decree that has not been subverted since 1950 to the present day, not [fol. 643] one.

The Court: We are talking now about the new decree.

Mr. Evans: That is exactly what I am talking about.

The Court: What is the matter with it? What do you object to in this proposed new decree particularly?

Mr. Evans: Sir, I would not like to stand here and discuss this. Either I will come up—

The Court: No. You cannot do that. Then you rest upon the statements made by your attorney, Mr. Horsky?

Mr. Evans: Yes, that is quite true, and I rest further upon the statement that I made before.

The Court: All right, Mr. Evans. Now Mr. Freedman.

• STATEMENT BY MR. FREEDMAN

Mr. Freedman: Yes, sir.

The Court: I have your name down as one who wanted to speak.

Mr. Freedman: May I from this point state my very short remarks.

The Court: Surely. What is your interest in this matter? Are you a publisher?

[fol. 644] Mr. Freedman: Yes, a publisher, sir, Templeton Publishing Company.

I would like to know how it is possible for a song which I venture to guess everyone in this room knows very well and which has been performed in at least five figures since May of 1958—I should like to know why this song has not as yet even appeared on our statement.

The Court: What is the name of the song?

Mr. Freedman: "Be Sociable." Would you like me to sing it, your Honor?

The Court: No, I know it. I suppose I will have to tell this off the record.

• (Discussion off the record.)

The Court: Mr. Battle?

Mr. Battle: Your Honor, you told me I could speak for Bob Davis, and I didn't get a chance to touch on his subject.

The Court: All right. Let Mr. Freedman talk and finish what he has to say first.

Mr. Freedman: I would like to know, your Honor, how it is possible in any system—

The Court: Suppose we ask Mr. Dean to make a note of that and refer to that when he speaks this afternoon. [fol. 645] You want to know how it is possible for a song which has been a hit not to appear on your credit sheet.

Mr. Freedman: I didn't say a hit, sir. I said in terms of performances in recognizability.

The Court: It has been a fairly good number. Would you say that?

Mr. Freedman: At least.

The Court: Fairly good number. We will have that answered, I hope, by this afternoon for you. Is there anything else you wanted to say, Mr. Freedman?

Mr. Freedman: I would like to ask a question of Mr. Kilgore whom I recognize as one whom I have met on more than one occasion in the Justice Department building. You, your Honor, have made reference to the fact that the Justice Department could go into the ASCAP books and find out whatever they wish to know.

The Court: They have a right of access and of inspection.

Mr. Freedman: May I then ask Mr. Kilgore if he has done that in this connection with the proposed consent decree?

The Court: I will ask Mr. O'Donnell who is here to later on make an answer to that this afternoon.

[fol. 646] Mr. O'Donnell: Yes, your Honor.

The Court: Mr. Battle, you wanted to say a parting word.

Mr. Battle: My brother Bob Davis would like to have the Court know that ASCAP—

The Court: What does brother Davis' business? Is he a publisher?

Mr. Battle: A songwriter. He says that since the ASCAP—the Society is licensing its works to the people that are using it on a blanket basis he would like to know if it was under the providence of this Court to have ASCAP set aside a fund so that the members of ASCAP that are receiving nothing for their works would be able to get something on a basis of seniority or such. He told me to ask you that as a question.

The Court: I can't do anything except what has been agreed to by the parties here. However, we will ask Mr. Dean or Mr. O'Donnell. You answer that one this afternoon for Mr. Davis.

All right. Now we will adjourn until 2 o'clock.

(Luncheon recess taken until 2 P. M.)

[fol. 647]

AFTERNOON SESSION

2 P.M.

The Court: I think we will go ahead. First we will hear from Mr. Dean.

STATEMENT BY MR. DEAN

Mr. Dean: If the Court please, when I was first retained in this matter, I discussed what seemed to be the problem facing ASCAP and the Department of Justice. I advised Mr. Finkelstein and Judge Pecora and Mr. Cutler of Washington, regular counsel for ASCAP and the board of directors, that it seemed to me that in working out this proposed consent decree, if we can work it out, that we had a rather broad social problem, and part of our problem was to make sure that each member of ASCAP was dealt with fairly and equitably, and that each member of ASCAP had complete access to the records of ASCAP in so far as it concerned the allocation of ASCAP income to him, and that there ought to be some better method of classifying these performance credits other than based on subjectivity. I also advised them that there ought to be some direct appeal to some organization like the American Arbitration Association.

After we studied this matter for some time, it became quite apparent to me that despite the fact that we were dealing with songs and lyrics and public taste, and some [fol. 647a] songs were what might be called serious music, concert or chamber music, others might be jazz, some might be rock and roll, some might be religious, that the primary question was whether each of these writers was being dealt with fairly and whether or not ASCAP itself was in the public interest, and whether or not you could with the Department of Justice and with the approval of the Court

work out a consent decree; that despite the enormous complexity of the problem, with large individual writers and the various catalogs of the publishers, whether it was possible to work out any kind of a consent decree which would be generally acceptable to the members, acceptable to the Department and to the Court.

After studying the matter for some time, I felt that we ought to get in some completely independent survey organization. After discussing the matter with the board, they authorized me to retain this Joel Dean Associates. I believe that that organization, based upon the program that is outlined in the order that your Honor has already signed and in the memorandum that they sent out, is honestly going to try to do an able and honest job and as scientific a job as is humanly possible. I think they are going to do their [fol. 648] level best to reduce the margin of error to a minimum and then by trial and error try to reduce those margins of error.

As far as the provisions of the order, with respect to your Honor's right to appoint some independent and qualified person to review these procedures periodically, and the order is broad enough so that you can go into the whole question of the depth of a sampling and the conduct of the survey and the accuracy of the data fed into the survey, I would like to say that I think that rests within the sound discretion of your Honor.

As I read the proposed order, it would seem to me that if the person selected by your Honor is not himself an expert in the sampling field, that your Honor has the discretion to select somebody of competence and ability and independent who in turn, if your Honor so wishes, could exercise or supervise another independent expert in this sampling field. I merely want to point out that I believe your Honor has discretion as far as the wording of the order is concerned, and that you are not limited for the purposes of the order.

As I read the order, it is in connection with whether this survey itself is accurate and whether it is being properly [fol. 649] conducted, both as to manner and as to content.

Let me address first to this question of timing. When the order was drafted last spring, we hoped it could be made effective on or about October 1st of this year. Accordingly,

there are several references in the consent order and in the attachments to the consent order and in the writers' distribution formula and the weighting formula to the date October 1, 1959, the time when some of the provisions would go into effect.

The Society for many purposes is on a fiscal year basis, starting October 1st of each year, ending on September 30th. So that the current performance option, for example, is addressed to a full fiscal year as are certain other provisions.

In response to the question of whether we could not speed up this time, I have suggested to the Department of Justice, and they agree, that on the assumption that the proposed consent order meets with your Honor's approval we would review all of the dates now set forth in the various provisions of the order in an attempt to get the earliest date possible as a starting date for each of the provisions. We would then join in asking your Honor to substitute [fol. 650] these new dates for those currently appearing in the document submitted.

Let me for just a moment discuss the timetable that we have in mind and some of the procedural problems. We feel that it would take about 75 days between the time, assuming approval were expressed by your Honor, from the time of the entry of the proposed consent order and the time when we can certify to the Court that the membership had approved the necessary changes in the Articles of Association. But the Articles of Association of ASCAP require the following steps for amendment. First the board of directors has to call a membership meeting on the West Coast and one in New York to discuss the proposed amendment. This will require about a week for printing and mailing, plus two weeks' notice of meeting, with about one week interval between the two meetings. My calculation is that this procedure will consume about a month. After the membership meeting, the ballots must be mailed to each member, who has 20 days within which to return his ballot. Then it will take a few days to tabulate the results.

The Court: Does each member of the Society—you don't mind me asking you this, so I can understand what the situation is—does each member of the Society have one vote?

[fol. 651] Mr. Dean: Yes, sir.

Mr. Milman: No, your Honor.

Mr. Dean: Each member of the Society has a vote in accordance with the weighted schedule of voting that is currently set forth in the 1950 decree.

The Court: For instance, I was told that there are 1,100 publisher members and that there are 5,300 author and writer members, approximately.

Mr. Dean: That's right.

The Court: I understand that the by-laws provide that there should be weighted voting.

Mr. Dean: That's right.

The Court: And each member having a weighted vote in proportion to his interest, which is set by the by-laws, in the association.

Mr. Dean: Yes.

The Court: Is there any way of having at the same time for the information of the Court a ballot taken on a purely numerical basis, so that we could determine how many publishers, by number, are in favor of this and how many authors by number, authors and writers by number, are in favor of this?

Mr. Dean: If I understand your Honor, not in connection with—

[fol. 652] The Court: Have it taken both ways. Have it taken by way of a weighted vote in accordance with your by-laws and have it taken on a pure numerical basis, without the weighting.

Mr. Dean: As I understand it, that would be for the information of the Court?

The Court: For the information of the Court, yes.

Mr. Dean: I see no objection to our doing that.

The Court: All right.

Mr. Dean: I might complete this schedule, your Honor.

The Court: Go ahead, don't let me interrupt you, because I want you to keep on your notes.

Mr. Dean: We think it is possible to complete these formal proceedings in about 60 days, and with the problem of printing time and mailing, it would take about 75 days.

Assuming again that the order is approved, and assuming that the members approve the appropriate articles of as-

sociation, and we so notify the Court, let us assume an effective date of the order of January 15, 1960. Then the following steps would have to be taken before we could [fol. 653] elect the directors: First, each member should then be sent a notification as to the number of votes he would be permitted to cast at the election, and the total number of eligible votes of all members.

Second, if anybody wanted to take advantage of the nominating committees that would have to be appointed to nominate candidates and an opportunity would have to be given pursuant to Section IV (D) for any group of 25 members to nominate a candidate, then I would think that these members who wanted to nominate a candidate should be given, say, 60 days during which time they could attempt to elect one or more directors by a petition of one-twelfth of the eligible writer or publisher votes.

Section IV (E) requires a 90-day interval between the final date to elect directors by petition and the actual voting for directors.

Now, let me point out that the votes would be based on performance credits during the latest available fiscal survey year, so that prior to July, 1960, the latest available performance credit figures would be for the year ending September 30, 1958.

[fol. 654] The votes based on credits for the year ending September 30, 1959, will be available in July 1960. Now, it was for these reasons that we had suggested that the election of directors take place early in 1961, and the members could be advised of their respective numbers of votes in July, 1960. They could have until October to elect by petition. Then the general election would follow in 90 days thereafter.

If it were agreeable to your Honor to take the figures for the period September 30, 1957, we could accelerate this procedure. But we thought that you preferred to have it for the latest available date, which would be September 30, 1959, until some time in July 1960.

If you wanted to do it on the performance credits for the year ending September 30, 1958, rather than on the performance credits ending September 30, 1959, we could

step up this procedure, and as to that we are entirely agreeable.

The Court: It is more desirable to step it up.

Mr. Dean: As to that, we are quite agreeable.

[fol. 655] The Court: All right.

Mr. Dean: In his outline, Mr. O'Donnell discussed radio network sustaining and television network sustaining programs. He quite correctly stated that ASCAP would discontinue its complete census of the radio network sustaining programs. The reason that we are doing this is solely on the basis that the cost seems disproportionate to the revenue attributed to those programs. Even more important, ASCAP has no way of knowing how many stations carry radio network sustaining programs. It is our understanding, and we have checked this, that there is no requirement in the radio network that a member carry that sustaining program, and, in fact, we know that some of them do not, and put on programs of their own.

That does not mean that this census will not make the appropriate sampling of these radio networks sustaining programs. They will be taken care of in the sampling of the local radios, and they will be checked against appropriate publications and will be checked against appropriate logging, and that can be worked out again by experience.

The survey will continue the 100 per cent census of television network sustaining programs, because they are economically very valuable and, further, the television networks supply ASCAP with the information as to the number of stations carrying each program. This makes it possible to compute the proper performance credits.

It has been stated here that in 1951 the 60 per cent Sustaining Performance Fund was split, and that the 30 per cent Availability Fund was split without the knowledge of the Department of Justice. The fact is that this change was discussed at length with the Department of Justice before it was adopted by ASCAP, and I believe that Mr. O'Donnell will verify this fact. No changes—and I want to emphasize that—no changes were made in the distribution formulæ after the 1950 amended consent decree without prior notice to the Department of Justice.

Let me turn for the moment to the four writers' funds. It has been said here that only 20 per cent of the money under the proposed four funds system would be distributed on the basis of performance. On the contrary, a hundred per cent of the money will be distributed on the basis of [fol. 657] performance. 20 per cent will be distributed on the basis of current performance in the last fiscal survey year. 30 per cent will be distributed on the basis of the average performance over the past five years.

The former members option of five or ten has been limited to five, and there have been quite material changes so that younger writers are coming up faster, and as Mr. Lopez and Mr. Battle commented to you this morning, in the interests of what we believe to be the interest of writers and the Society generally, we have taken off some of the brakes on the deceleration of performance credits of people who wrote music many years ago, but who have not had performance credits within the last five years.

30 per cent will be distributed on the basis of the average performances of recognized works over the past five years. The definition of a recognized work, something that had to be performed within a year after its first performance, is to get rid of those works that are plugged and have no real survival.

The reason for the five year average in this and the [fol. 658] previous fund is merely to level out the peaks and valleys of income.

There is a 20 per cent membership continuity fund, that is based on a five year average performance multiplied by length of membership with a maximum limit of 42.

We discussed at length with the Department this provision of the writers distribution formula that permitted writers to receive payment for a period of years from the availability and accumulated earning funds on the basis of the past popularity of their catalogs. Even though their works were receiving few or no current performances. The Department argued that the existing brakes which limit the rate at which writers distribution can decline add in the Department's opinion a very real anticompetitive effect of diminishing the money available to young writers.

It might possibly discourage them from entering the music writing profession or their inability to increase their income even though their music was popular at a sufficiently rapid rate might cause them to leave this field and to go into other fields.

[fol. 659] The present system was referred to by some of today's speakers as a pension. It was never that. As your Honor is well aware, there is just so much money received by ASCAP after the deduction of expenses which can be distributed. The question that confronted us in working out this proposed decree with the Department was this:

Could ASCAP continue to restrain the acceleration of these current payments to younger writers and at the same time continue the payments to all the members on a basis which included performances of several years ago, when they had not had recent performances? The Department argued that it could not and in fact held out strenuously for taking out these provisions entirely.

Your Honor heard speakers today on both sides of this question. Admittedly this is a very difficult question. We discussed this with numerous writers. We discussed it with committees of writers. We discussed it many, many times with the board of directors.

Finally, we agreed in the proposed consent order, that after a transition period of three years—that is in here so [fol. 660] that people can make some adjustment—that no money will be paid on the basis of performances other than those of the five latest years.

So that for the members that Mr. Eastman was talking about, namely, those members who had no work performed during the preceding five years under the proposed order, their distribution would be zero times their length of membership, and they would get zero dollars. That is what Mr. Lopez was objecting to and what Mr. Battle was objecting to. So only if they have performances could members get money from this fund or from any of the other funds.

Let me turn briefly to this current performance option. Again, this was one of the most difficult problems that we faced, and we spent many hours and days discussing this with the Department of Justice. The Department felt that many younger writers were not being paid for their works

which were current, and some writers felt that although they found merit in the averaging of their performances, they found merit in the recognized works fund and they found merit in the continuity of membership fund, they [fol. 661] nevertheless felt that they ought to have the right if they so wished to get paid 100 per cent on the basis of the current performance fund, and that the younger writers ought not to be required to wait until they have become a so-called old or middle member.

[fol. 662] It has been stated here today that this current performance option, which we thought was very constructive and we felt very proud of being able to work out that provision with the Department of Justice, is not attractive because those who elect to be paid on the percentage of the ASCAP revenue represented by the percentage of their current performances would not share in the money which the top 100 writers leave in the Average Performance Fund by reason of the diminishing credits that go to the top writers above 39,000, would not share in the Recognized Works Fund, and the Membership Continuity Fund.

Because these recognized writers firmly believe in ASCAP, because many of them went through a long and lean period when they were trying to get ASCAP established and when they had hard personal times when they went through long periods of litigation, and because they had believed in ASCAP, believed very strongly in the fact of this diminishing credits theory for the older writers above the 39,000 credits, and because every writer, as I understand it, even though he has been writing successfully for some period of time, always had the haunting fear [fol. 663] that some day he will wake up and his creative ability will leave him or that it will leave him for some period of time or that public tastes will change and he will no longer be able to write things which are popular with the public—it is my understanding that that is the sort of haunting fear or the basic fear of all creative writers—the older writers, having been through this rather tough period, worked out this theory of diminishing returns and the averaging of the performances.

Again this is a question of what is fair and equitable for all of the members, and this will have to be submitted, if

your Honor approves the order, to the members of ASCAP.

But it hardly seems to me that, if somebody wishes to elect to take all of their own performances on a current performance basis pursuant to this option which has been worked out, they can object if the other members, with all of the facts before them, vote that they want their money distributed on the four funds basis with the flowdown from the performance credits of the older writers on this diminishing credit formula.

In other words, the Department and ourselves felt that [fol. 664] we were giving something to the younger members which they wanted, and the objection now seems to be that: Yes, you have given it to us, but we would like to have our cake and eat it, too. What we really would like is to be in the position of having a hundred per cent of our own current performances but we would also like a share in the averaging of the four funds. That, I submit, is mathematically impossible to work out.

Now let me turn briefly to this question of recognized works. It has been agreed here that a song like "Old Man River" or any recognized work that has established itself in the hearts of the public so that when it is played by the licensee on the program it breaks through to the public and so the public immediately recognizes it and stays with that program or else turns to that program—the licensee has the right to use as much or as little of the ASCAP repertory in his program in selling automobiles or lipstick or what have you as he pleases, and the licensees tell us in our negotiations with them that these recognized songs are the things that enable them to get the public to listen to their [fol. 665] programs, and they tell us that although younger people may in some instances like the ultra modern jazz or the ultra modern rock and roll the people to whom they are addressing themselves, who are presumably adults who are earning or have saved a little money want them to play the songs that were popular when those people were married or when they were young so there will be some kind of an appeal in the program, and it is that kind of a song in our catalog for which they are paying.

I have been into this question and I have listened to arguments on both sides of this question for literally hundreds

and hundreds of hours. I have tried my best to examine all sides of this question of whether there ought to be any distinction between a recognized song and a song that has just been written, and I have come to the conclusion that ASCAP is correct in making the distinction with respect to 30 per cent of the money distributed to the Recognized Works Fund between those works which exhibit audience demand and have survived the so-called initial plug period and as indicated by the fact that they continue to be played more than a year after the first performance and the transitory hits which do not last a year and consequently do not share in this fund.

I think I have heard more criticism from those who think the established works are not paid enough than from those who think that their admittedly greater value shouldn't be recognized at all, and again that is a question of the balancing of the equities, in trying to work out something here that is equitable and fair and is not anti-social from the standpoint of society or at least does not violate the competitive features of the antitrust laws.

As has been stated here and as your Honor is well aware, 50 per cent of ASCAP's revenues go to the writers, 50 per cent go to the publishers, and of the 24 member board 12 are elected by the writers and 12 are elected by the publishers.

This fact seems to have been ignored in a good many of the statements here. So that when the entire ASCAP board, that seems to be broadly representative, has been referred to constantly as a dominant board, referring entirely to the percentages of the publishers, it is as though the 12 writer members of the board were ciphers and as though they could be completely and totally ignored.

[fol. 667] Again the figures of all these publishers have been lumped together as though they were a unit, whereas actually they are in rather stiff competition with each other.

I would also like to call the attention of the Court to the fact that three of the publisher directors—that is, Johnny Marks, Irving Caesar and Adolph Vogel—are small publishers. This is indicated by the fact that they would have only between three and six votes under the proposed voting system. Three of the directors are medium sized and not

large publishers. They would have between 21 and 43 votes under the new system.

The writer members with the small and medium sized publishers on the board together represent, if I may aggregate them, 75 per cent of the votes on the board of directors.

Under the proposed new order no one publisher or group of affiliated publishers would have more than about 11 per cent of the votes, and I know of no presumption which can be indulged in that some 10 or 12 separate groups of publishers, each with different and diverse interests, constitute [fol. 668] a single unified group. Yet it is only on this assumption, it is only by lumping all these diverse publishers together, that you can assume that there is a so-called controlling group which would have as much as 30 per cent of the publisher votes.

Again on this question of amending the Articles of Association, in the statements that were made here the votes of the writers were ignored. Let me call your Honor's attention to the exact provisions of the Articles of Association. It is a rather complicated formula.

The formula, as set forth in the Articles of Association for amendment requires two-thirds of the average of (1) the total available writer votes and (2) the total available publisher votes, and in this detailed formula you take the percentage of the available writer votes which are voted in favor of the amendment and the percentage of the total available publisher votes which are voted in favor of the amendment, and unless the average of these two percentages, that is, the writer percentage and the publisher percentage, is $66\frac{2}{3}$ per cent the proposed amendment will fail. [fol. 669] I just don't see what the basis is for assuming that any group of publishers could control this entire writer-publisher vote. On the contrary, I think it is very plain that the necessary amendments to the Articles of Association must represent general membership approval or the amendment cannot be adopted.

Again on this question of voting, I gather this is a very difficult subject and this again is a subject which required many hours of discussion with the Department of Justice and, as I am sure your Honor is well aware, many hours

of difficult negotiation on the part of all counsel with the publishers in an effort to get them to agree to these very real reductions.

The top ten publishers and their affiliates would be reduced from about 63 per cent to about 37 per cent of the total publisher votes, and the publishers affiliated with board members would have their voting strength reduced from about 56 per cent to about 30 per cent of the publisher votes.

It has been argued here that those who make the greatest contribution to ASCAP in the form of catalogs which they [fol. 670] contribute should not have the power to elect a board of directors. Nevertheless it has also been agreed that those who make the least contribution to ASCAP should not be in control. However, it has also been suggested that the Court should make the voting power of the members academic by transferring the management of the Society to some third party beyond the control of the members.

The Court: You don't have to worry about that. I don't think that it is any part of the Court's duty or obligation. I am opposed to unnecessary judicial intervention and judicial supervision with any business enterprise.

Mr. Dean: Thank you, your Honor.

I might just conclude these publisher figures. Using the 1957 performance credits as an example, and these publisher figures have not been computed for later years, and applying the new formula in the proposed order the 73 per cent of all publisher members who together had only 3.9 per cent of the performance credits would get 13.13 per cent of the votes or three times their contributions to ASCAP.

Now on the writers side I might say they are always a [fol. 671] year later than the publisher figures, and the reason for that is that the writers like to have a year elapse so that each quarterly payment is even, and the publishers don't care about that so they get paid earlier. But taking the 1956 performance credits with the votes calculated on the proposed new voting system the result would be that the top 86 writers who had 49.3 per cent of the performance credits would have only 23.6 per cent of the votes, and some

2108 members with only 2.1 per cent of the performance credits would have 11.3 per cent of the votes or over five times as much as they would have on a formula which took into account only their contribution to the ASCAP repertory.

Again it seems to me that members with few performance credits both on the writers side and on the publishers side could use the petition system, and I have outlined here how we plan to give them the information so that they can organize to elect directors to the board.

It has been said here that people will be afraid to sign such petitions. Well, I would like to state to your Honor [fol. 672] that we will arrange for these members who wish to get up such a petition to sign it secretly, and the ASCAP board will have it examined by an independent board of auditors without indicating the names to the ASCAP directors so that there won't be any fear of reprisal.

I think that is unjustified anyhow, but it seemed to me that that proposal ought to satisfy anyone on that point. [fol. 673] I just couldn't follow Mr. Horsky's statistics. They seem to have been taken from my speech, but it seemed to me that there is a good deal of confusion between the top ten groups of affiliated publishers on the one hand and the publishers represented on the board on the other hand, and it seemed to me that the votes which either group would have under the new formula are greatly exaggerated. One theory may be that they added to the board of directors the votes of Irving Berlin, Inc. and some other top publishers who were not on the board of directors.

One of the assumptions that was made here seems to be that the records were not properly kept. I would like to say that in working out this decree with the government we have tried, in addition to the visitorial powers of the Department of Justice, to work out provisions here which make it very clear that a member has the right to inspect the records of ASCAP in so far as he has a legitimate interest in them. We will set up this new classification committee which will be quite different from the board of directors and we will have these appeals to the American

Arbitration Association. We will make the records available and we will give them copies of the transcripts.

[fol. 674] It seems to me that Mr. Horsky in his presentation had the survey backwards. It will be the Joel Dean Associates who will decide on the depth of the sampling and who will decide on what is to be sampled. And while the people in ASCAP, as has been said, are not necessarily trained as musicians, nevertheless they are highly trained in listening.

It is a curious thing. We discover that sometimes the abler the musician the less he can listen to music that he does not like. He gets irritated and he slams down his earphones or he refuses to listen or he exclaims that that is not music. But we have trained these girls so that we think they do a very creditable job of listening.

But again we think that both the Joel Dean Associates and this independent expert that the Court has the right to appoint would certainly have the right either themselves to make the correction or to report to the Court if the listening to these tapes or the checking of these logs is not done on a highly efficient and proper basis.

As the Court's order recites, one of the very purposes of this survey is to cut down the percentage of non-identification, [fol. 675] and the order itself sets out the basic design of the survey. Certainly Joel Dean Associates is going to have all the power they need to make sure that this is a completely honest and completely efficient survey.

It has been suggested that the employees of ASCAP working on these matters should be fired and that we should go out and get a completely independent agency. I don't know of any such independent agency. In all my investigations I have never found one. Further, this independent agency would not be responsible to the board.

In his presentation Mr. Horsky's heart also seemed to bleed on behalf of the radio and television licensees. He seemed to feel that ASCAP was getting entirely too much money out of these radio and television licensees, and that is one of the reasons why ASCAP ought not to be in control of its own affairs. Well, I wonder just how the members of ASCAP feel about that suggestion.

It seems to me that ASCAP as a Society acting through the board of directors ought not to be deprived of the services of those who have the greatest stake in ASCAP by contributing their catalogs in carrying on these negotiations. [fol. 676] It seems to me that this question of records can be amply taken care of in the provisions we worked out with the Department of Justice in the survey.

[fol. 677] Now, let me turn to this question of foreign revenues. It is my understanding that for the last available period the total amount receivable from Sweden is \$100,000. There has never been any attempt by the Swedish Society to distribute that directly to her members that I am aware of.

Let me call your Honor's attention to the fact that any member of ASCAP can license any foreign society directly if he so wishes.

The Court: I am not concerned so much with that foreign provision, that does not trouble me.

Mr. Dean: I won't labor that further.

COLLOQUY BETWEEN COURT AND COUNSEL

The Court: I will tell you, Mr. Dean, what does bother me, and it has bothered me from the very beginning, and that is not a matter of judicial protocol but a matter of common sense approach to this whole thing. I have before me a proposed amendment to a consent decree.

The proposal itself is supposed to be before me on consent and yet when I inquire into it, it is not before me on consent. Therefore, I wonder whether at this time I can act upon what is before me. Everybody who has spoken here has represented that he is a member of ASCAP. Apparently, all of the opposition springs from within the membership itself, all that has been expressed here today.

I feel very frankly that while I must pay great respect to the recommendation of the Attorney General in charge of the Antitrust Division and his judgment is entitled to great respect in these matters, in which he has an expertise, and while I am personally impressed with your desire to be fair, and although you function as counsel for the Society

I think you have approached the whole matter with a very broad and businesslike point of view, still I don't think that at this stage I should begin to analyze this decree until it has first been voted upon by the membership.

I have been reading the transcript of the hearings before the Congressional Subcommittee No. 5, and I have a memorandum—I don't believe it is confidential—submitted by the staff of that committee to its chairman, Congressman Roosevelt, in which the staff has made a study of this decree. I gather that is their view, as indeed it is my own in substance, although this proposal which is now before me is not perfect, it is at least a substantial improvement upon present conditions, it does not foreclose [fol. 679] further steps to accomplish and achieve further improvements when they appear to be either necessary or desirable. It permits of further study of the situation.

As I read this report or this memorandum to Congressman Roosevelt, I agree with many of the observations. For instance, there is an observation speaking of the problem of the weighted voting system that the proposed decree deals with this problem and contains provisions which will require important changes in voting procedures, without doubt these changes will improve the situation. I agree with that. That is my reaction, expressed in terms as I would express them myself.

Then, with reference to the performance survey and the logging system, I think the proposed survey and logging system is an improvement of what is presently in force and effect. It is noted that the Antitrust Division has reserved the right to ask the Court at a later date to require changes of improvements in the survey procedures. Accordingly, further improvements should be required if found desirable. We can only find out if they are desirable by testing out these surveys as now proposed and the logging systems as now proposed.

With reference to the distribution formula set forth in [fol. 680] this new proposal, it is an observation that I prescribe to, and it is my own reaction, this is the first time I have read this. Apparently, my line of thought goes along identically with this, although I have never seen it before. It came in, I think, yesterday and my secretary

had it and tried to give it to me three or four times, but I had to read too many other things and I did not have time to get to this. But there is a further observation with reference to this distribution fund. It says, "The decree now being proposed seeks to overcome a number of the objections outlined above. It appears doubtful that it will bring a necessary degree of relief."

I don't know whether it will or not either, but at least it is a step forward and let us try it out and see if it does or not. We are not precluded from asking for further changes.

Speaking of this seniority or old time sentimental care custom, which traditionally has been one of the boasts of the stage, they take care of their own—for years back, we had the old Percy Williams Home, we had the Will Rogers Home at Saranac Lake, we had the Actors Fund for years, and this is a profession that has been known to [fol. 631] make extraordinary efforts to take care of its old members. There is really more than a professional bond that exists among them. I often pray we had that amongst the Bar, but we don't. However, these people of the theatrical world, they have a dedication to one another and an interest in one another, which I think is remarkable and very commendable. This seniority fund seems to be in line, as far as I have been able to observe, with their fine and commendable traits and traditions.

I for one would not want to see it wiped out entirely. They speak of that. The proposed decree is an improvement, but its adequacy appears to be subject to question. I don't doubt that, but it is an improvement, let us have it. Let us try it out. Speaking of the grievance procedures and availability of records, this reads, "The proposed decree would seem to bring about substantial improvement in this situation."

I personally think it would. I don't think it is perfect. I am inclined to say that we should try it out. It goes on further with respect to the grievance procedures and availability of records, and makes the observation that "This portion of the proposed decree contains important provisions, important improvements, relief to the oppressed [fol. 682] members, therefore, is to be expected."

That is my reaction. It is not perfect. Nothing of human creation can be perfect in the true sense of the word. We have to try it out.

Finally, in the conclusion, I read this one sentence, and I don't think I am picking the sentence out of context in the light of the remarks I made about them. "If the proposed decree in its present form is approved, the Society will be compelled to make some changes, but it is believed that more are needed."

Perhaps more are needed. Let us try out these, at least we get a step forward. My reaction is, and while this proposed—I cannot call it a proposed consent decree, because it is not that, it seems to me to be a step forward. It seems to me to be an improvement in present conditions. For that reason I would be inclined to give it my detailed approval after I had studied and after I had written on the subjects and on the provisions. Frankly, I don't feel that I should write an opinion or make a detailed study on where there is essentially a purely hypothetical proposition. And that is what this whole proceeding is. What I have in mind is this: Adjourn this hearing. Take your vote amongst your members. Come back here and let me know what their [fol. 683] vote is. Then I am acting on a situation where you can stand before me and say, "I join with the Attorney General and on behalf of the Society I do consent to this decree and to these modifications." You don't take that position and you cannot do that today.

What you are asking me to do, and perhaps it is just as well that you have asked me, because I believe that a public airing of these things prior to the vote is sometimes conducive to a better understanding and a better appreciation of what is involved, but I don't feel I should at this time say I approve of this and wrote a long dissertation or opinion on something which is subject to ratification by your own clients at a subsequent date.

I suggest, and I think the procedure to be followed is that we adjourn this hearing until some time you feel you can hold this meeting, come back on that day and tell me that you either do consent or you regret but you cannot consent, because your Society is authorized or not authorized to do so, as the case may be.

Mr. O'Donnell: That is satisfactory to us, your Honor.

The Court: I don't, when I make that statement, want to appear to be standing on judicial prerogatives. I am not. [fol. 684] I am trying to approach this as a practical matter. I think this is a serious social problem. What are we going to do with these copyrighted works and productions?

The men who have produced them are entitled to be paid for their use. I don't know of any other system other than a pooling of these things as we have here in ASCAP, that can be made workable in our system of society. Unless you have some kind, as I commented the other day, some kind of compulsory licensing on a specific royalty basis, as you have in phonographs. I don't know how these authors could collect otherwise.

Mr. Dean: Could I think out loud with your Honor here a minute?

The Court: That is what you are supposed to do. I think everyone has been frank, I have been frank, and although I have quipped with various lawyers, I have done so primarily in the spirit of trying to get cooperation.

You have a serious problem. It does not affect my pocket-book—indirectly perhaps it does, but directly it is affecting the pocketbooks of these men who make this their livelihood.

God knows, where would we be in this world if we wiped [fol. 685] out our music and musicians? Everybody's idea of what music is differs, but if we wipe out music from our lives it would be a sad world. I sometimes think that the old days, when we had a band playing in every village green, when we had the old brass band walking at the head of May parties, that those were the real days, when we really had something.

As you get older, you like to live in the past. Your memories of the past come to mind, but I don't like to think of the future, of our future, of having a future without music.

Think out loud and let me hear what your thoughts are.

Mr. Dean: There are several problems, your Honor. Your Honor knows from what has been said here and from Mr. Lopez's letter that you have the problem of estates and you have the problem of distributing this income. We also have the problem, since ASCAP is a non-incorporated

association in New York, whether we can, so to speak, put up a tentative vote to our members.

The Court: It would be a definite vote either that you do approve to the consent decree or you don't.

Mr. Dean: What I am driving at is this: Those opposed to the Society approving this consent order—and the [fol. 686] thought just occurred to me, perhaps it isn't so, I don't know—but they might be able to say to people, "Even if you vote for this, you don't know whether the Court is going to approve it."

The Court: You don't have to be a fortune teller to have the sense—excuse me, I shouldn't speak that way. You don't have to be a fortune teller to infer from my remarks what my expected action might be in the future.

I am not binding myself, however. I am giving my present reaction. I don't know how I can do it any plainer than I have done.

Mr. Dean: I appreciate what your Honor has said and I fully appreciate that this is a very grave social problem and that we are dealing here with something that is terribly important.

The Court: What is going to happen is this, as I see it, Mr. Dean, it has to happen: Either you are going to help the government clean house or you are going to get legislation that is going to clean it for you.

Mr. Dean: I agree with that.

The Court: It has to come that way. Your Society and its members are the ones to make the decision. Apparently, Congress is already watching the situation. All of these [fol. 687] hearings are supposed to be designed to aid in the promotion and consideration of legislation.

Mr. Dean: I think the hearings were very helpful to us.

The Court: I have been impressed by them. They have shown weaknesses in your organization, they have shown some weaknesses in the administration. This decree proposes to make some changes.

I think it is a step forward in the right direction. However, I am not going to give my final approval, and I am not going to consider it paragraph by paragraph or at length, on what is purely a hypothetical matter. I don't think I should be asked to. I think that this hearing has

served a very good purpose. At least we have had an airing of views, they have now been publicly expressed. See what your members think of it. If you come back with their approval, we will be glad to hear, you on it, not again at this great length, of course.

Do you want a ten-minute recess to think it over?

Mr. Dean: Yes, your Honor.

The Court: All right, I will give everybody a ten-minute recess to think it over. If anybody wants to be heard, I will hear them.

[fol. 688] (Recess taken.)

The Court: Mr. Dean, Mr. Davis who is here feels that he was not adequately represented by what Mr. Battle said, and he asked to talk just for two minutes. Suppose we let Mr. Davis talk for two minutes. Is he here?

Mr. Davis: Yes.

The Court: You want to say something? Come right up, sir. Say what you have on your mind.

STATEMENT BY MR. DAVIS

Mr. Davis: I am a little nervous, I might need something to brace myself on.

The Court: I hope you don't brace yourself on anything as fragile as glass.

Mr. Davis: No, sir. Not being represented by counsel, well, I am a good writer, maybe I should be in that big class that they keep talking about. I write that type of song, in fact, any kind of song I can write. I am merely a songwriter.

I have been attending meetings of the Society and I have never heard anyone come up with a suggestion of a compromise or a solution. It has always been criticism and this one calling that one a thief and back and forth and back and forth. That is all I have heard throughout my association with the Society.

[fol. 689] I feel this way about it: It is just a matter of dollars and cents. I can't see why it is so complicated.

I have worked out in my mind and some on paper somewhat of a solution. I have been told that something similar has been tried before. When I first became a member

of the Society, I think the revenues of the Society were between seventeen and twenty-three million dollars. Now it has reached more than twenty-eight million dollars a year. Well, this is merely a suggestion to the amendment that I would like to suggest to the Society to ponder over. [fol. 690] Why couldn't a million or five million or ten million or whatever per cent—I am not going too high, sir—be set aside as a fund to be distributed among all members on an equal basis? The fact is that the Society collects its money on a blanket basis. They have contracts with radio and with television, movies, theatres, et cetera, throughout the world.

Even when I was in La Tuque, Canada, a place that is not even in the world, it is so far out, the owner of the place told me—the fact is I am an entertainer, you know,—that he pays ASCAP \$600, and I was surprised that he even knew anything about ASCAP, he is so far out in the sticks.

The Court: Mr. Davis, you would make a good MC.

Mr. Davis: Thank you, your Honor. The fact is that the money is being paid on a blanket basis, and I am putting before the Chair as a suggestion to the board to ponder over to set aside some percentage of that money to be distributed on a blanket basis the same as they collect it on a blanket basis whether the songs are played or not.

[fol. 691] One of the attorneys got up here and struck on the edges of it. But whether the songs are played or not ASCAP collects its money. Now, whether my song is played or not, or whether a survey is taken of my song or not, I am a member of the Society. So, if the Society is going to collect this 28 million or maybe 30 million or 38 million in time—and it may even get to 58 million one of these days because time marches on, but I don't have to tell you that because you know that, and the membership will increase some. I figure, sir, within the next 20 years the membership probably will be around 10,000. We will assume that.

So you use a figure of five or a figure ten to distribute a certain portion of the money on a membership basis over a period of—if a member has been in the Society five years he collects from the Society from the five-year group, and if he has been in the society for ten years he collects from

the ten-year group whether his song has been played or not, because he is still contributing.

The Court: I think there is something to your idea but I don't think you are going to have it work out. I would [fol. 692] like to apply for membership now in the Society.

Mr. Davis: Thank you, your Honor. I hope you will be accepted.

COLLOQUY BETWEEN COURT AND COUNSEL

The Court: Thank you.

Now let us get back to serious work here. If we don't have a laugh once in a while we will all be fighting with one another. Now let's get back to serious business.

Mr. Dean: Your Honor, I have conferred with my fellow counsel, Mr. Finkelstein and Mr. Cutler and Mr. Adams, the president, and your Honor's proposal is quite acceptable to us. However, there are one or two mechanical problems about it that I would like to point out to you:

In VII on page 15 of the proposed order—

The Court: Let's just get that and then we will read it out loud. But perhaps I should first ask you:

Is anybody here present who feel that my proposal should not be followed?

Mr. Horsky: I should like to endorse it, too, your Honor. However, I have a couple of suggestions to make when Mr. Dean gets through.

[fol. 693] The Court: Thank you very much.

Mr. O'Donnell: It is certainly acceptable to the Government.

The Court: Apparently then there is no opposition to it. That is one thing we all agree on now.

Suppose you read what you have in mind as you come to these different subdivisions.

Mr. Dean: I want to make it clear that there are two alternative ways of doing this and I would like to get your Honor's suggestions or directions on it.

VII(A) on page 15 of the proposed order reads:

"ASCAP is ordered and directed within three months after the entry of this order to submit to its membership any portions of this order as to which the consent of

the membership is required by the Articles of Association of ASCAP, and the board of directors of ASCAP shall recommend to said members that said consent be given."

In accordance with our past practice, your Honor, it was not our intention to submit to the approval of the members [fol. 694] the entire consent order but only those portions of it that require the consent of the membership, and my first question is this:

This is a consent order subject to your Honor's approval and subject to the vote of the members to the Articles of Association that ASCAP and the Department of Justice have agreed on. But shall we proceed as we planned to proceed under Article VII of submitting those matters to the members for their votes required to amend the Articles of Association, or did your Honor have in mind that despite the fact that that is not necessary under the Articles of Association we should submit two things to the board:

(A) The formal approval of the Articles of Association as to which the vote of the membership is required by law and then, as an advisory vote to the board of directors, this whole consent order?

The Court: My idea was, based upon a famous expression by a once famous president of our country, that open covenants openly arrived at are productive of peace, and I would suggest that the vote be taken on the entire proposed decree.

[fol. 695] Send a copy of it to the members and ask them one simple question:

Do you approve of this decree or do you cast your vote in favor of authorizing the Association to consent to this decree?

While individual members may have objection to one particular subdivision of the decree they may feel that others are advantageous and desirable and that on an overall basis they will take the bad with the good to accomplish an overall improvement. That would be my idea.

Mr. Dean: That is quite acceptable to us, your Honor.

The Court: Just make it a simple notice:

Here is a copy of what we ask you to vote on. Have we your consent or haven't we?

Mr. Dean: We would like to submit it, then.

The Court: Have you any views to the contrary?

Mr. Dean: No, sir, but I just want to make—

The Court: May I ask is there anybody here who has any views to the contrary?

Mr. Fishbein, do you?

Mr. Fishbein: I do not.

[fol. 696] Mr. Eastman: I suggest, however, that we first have a statement approved by the Court as to what the membership is going to vote on.

The Court: They are going to vote on whether or not they shall authorize the Society to consent to the entry of this proposed amended decree.

Don't have to write out a big proxy statement or registration statement of twenty pages.

Mr. Eastman: Just that one statement.

[fol. 697] The Court: Just a simple matter: Here is what we ask you to consider. Do you authorize the Society through its officers to give their consent or don't you?

Mr. Eastman: And that is without recommendation of management, in other words, as a pure poll.

The Court: Wait now. Any fair statement by the management, so-called, can be sent as an independent communication just the same as any member of the committees which have been formed may themselves send anything they want to.

Mr. Eastman: That leads to the question now of how we conduct this poll. Should we have an independent agency conduct this poll? Obviously, if you have all the votes going to ASCAP, then they have an opportunity to ask the voters to change the votes.

The Court: I will tell you what we will do. I have implicit faith and confidence in one of the members of the Bar here who is associated with ASCAP, Mr. Herman Finkelstein, and I would say have the envelopes addressed to him. Give him a Post Office box.

Would you accept that responsibility, Mr. Finkelstein?

Mr. Finkelstein: Yes, your Honor.

[fol. 698] Mr. Eastman: And, your Honor, Mr. Finkelstein, as I understand it, will hold that secretly—

The Court: He will rent a Post Office box to which these will be mailed. He will then have the key to that box. He will keep all of these votes. If you want them opened up here in court, I will accommodate you.

Mr. Eastman: No, no.

Mr. Evans: Yes, yes.

Mr. Freedman: Yes, yes.

Mr. Eastman: I have full confidence in Mr. Finkelstein.

The Court: I have absolute confidence in him. I have seen the way he has devoted himself to the interests of this Society, and I have found him in individual cases to be extremely fair, and I know that he has worked all hours of the day and night and he has tried to make me work the same hours of the day and night until I chased him out of chambers a couple of nights at half past 6 because I wanted to get home.

Mr. Eastman: Your Honor, as I understand it, we are going to have rules about this poll, then?

The Court: We don't want to make it too complicated. Let's not be a group of lawyers. I would rather have the [fol. 699] direct approach of Bob Davis.

Mr. Evans: Good.

Mr. Eastman: Our committee, for example, would like to communicate with the members of ASCAP.

The Court: You communicate with anybody you want to by separate letter. Only make sure that your letter fairly states your position.

Mr. Eastman: We require for that a list of all the members and their addresses, your Honor, which I think should be furnished to us as soon as possible.

The Court: What about that?

Mr. Dean: We will be glad to forward anybody's material the sealed envelopes to our list of members with affidavits that we have done so.

Mr. Eastman: We don't want it forwarded, your Honor. We would like to send it directly. We are members of the association, your Honor.

The Court: Wait a minute. Wait a minute. We will have affidavit by brother Finkelstein that he supervised this.

You can get your letters ready. They will address them free of charge. I cannot make them pay the expense of it, but I will ask them to address those letters free of charge and give me an affidavit filed in the court that they have mailed them.

[fol. 700] Mr. Finkelstein: We can go beyond that, your Honor. They may watch the Addressograph addressing all the envelopes and see that everything goes out.

Mr. Eastman: This proposed order provides for the listing being furnished. Why can't we start this democratic process by having it now?

The Court: Having what now?

Mr. Eastman: By having a list of all the members and their addresses.

The Court: I will tell you why, very frankly. You have some competitors in the field that might want your lists, and I wouldn't, for the protection of the Society and its members, make those lists public. I don't think it would be right. It is like a trade list of a business.

What is on your mind, sir?

Mr. Freedman: There is just one question, your Honor.

The Court: Of course you have a very able lawyer standing there.

Mr. Freedman: He does not represent me, sir.

The Court: Then that is your misfortune.

Mr. Freedman: I recognize that. There is prevalent among the members of the Society the fear of not voting [fol. 701] along with what the board would like it to vote for. I merely mention this because this has happened in the past, and we have had direct experience with this.

The Court: I am not going to stop anybody in this Association, either the board or anybody else, from sending out separate literature urging that one position or another be taken. That is done in every proxy fight, it is done in every business venture that we have today.

Mr. Dean: Before Mr. Horsky speaks may I just raise two more questions?

The Court: Yes, sir.

Mr. Dean: On this voting your Honor has also suggested that we have a poll of the individual votes, and it is quite acceptable but I assume that the voting—

The Court: When you tabulate these votes, first you will have them by number and then you will rate them. Of course from that list you will apply your rating. So you will have two ways of voting.

Mr. Dean: That is what I wanted to ask.

The Court: You will have two ways of voting—not of voting. You will have one way of voting and two ways of counting the votes, one on a purely numerical basis and the [fol. 702] other on a weighted basis.

Mr. Dean: I want to call your Honor's attention to the fact that prior to the time of the amendment we would, of course, have had to submit the proposed consent order and have that voted on and the Articles of Association in accordance with the weighted vote which is presently in our Articles of Association.

The Court: You do it any way you want to as long as it goes out to the membership at large.

Mr. Dean: One more thing and I am through, your Honor. Since we have agreed upon this consent decree with the Department of Justice it is implicit in our consent that we submit this proposed decree and nothing else.

The Court: That is all.

Mr. Dean: Thank you.

The Court: That is all. That is the way I understand it. Yes, Mr. Horsky?

Mr. Horsky: I have just a couple of suggestions, your Honor.

The Court: All right.

Mr. Horsky: First, it seemed to me that in view of the fact that this is a question which is being submitted to the members of the Association at the suggestion of the Court [fol. 703] for their vote it would only be appropriate that the Association pay the expenses of an equivalent amount of literature which may be distributed by members who do not believe this decree should be approved.

The Court: The trouble is this. I don't suppose it mounts up to too much money.

Mr. Horsky: It does on our side. That is the trouble.

The Court: We have had here 12 people speak. Who is going to get this money? You are not going to have the Association pay for 12 different circularizations, are you?

Mr. Horsky: No. We ought to be able to agree on who is going to send it.

The Court: If you can all agree, all 12 who have been here today or yesterday, and if the expense does not run too much—how much do you expect the expense would be?

Mr. Horsky: No more than that spent by the directors. We would not want to make it any more than they would spend.

The Court: We don't want this business of telephone solicitation and all that, you know, like they do in proxy fights.

[fol. 704] Mr. Horsky: I would like to have it on an equal basis.

The Court: 64 times 4 cents would be \$256 for postage. I suppose it would be fair to say that to send out a circular letter would cost maybe 10 to 12 cents, not more than a thousand dollars. I think that would be fair. The Association could afford that.

Mr. Horsky: That's right.

Mr. Dean: That is agreeable to us, your Honor, provided—

The Court: Provided you agree on one letter or one group to send out one letter. I think that is fair. I have no power to order that, but I suggest that to Mr. Dean.

Mr. Dean: That is acceptable to us, your Honor.

The Court: Not to exceed \$1,000.

Mr. Dean: One letter.

The Court: One circularization.

Mr. Horsky: It seems to me also, your Honor, if I may re-raise a question on which you have already indicated an opinion, that it should be possible for the membership to know the addresses of the people who are going to vote. The directors know. They have it in their possession.

[fol. 705] The Court: No. I am not going to make public a list of the membership at large. I don't think it is desirable.

Mr. Horsky: The order does it, sir, if it is approved.

The Court: We will take care of that later on. I don't think it is desirable at this time. I have entrusted this work to Mr. Finkelstein. I have implicit faith in him both as a man and as a member of the Bar. He will see to it that your

letters are run off on the Addressograph machine. You can have somebody there when it is done.

Mr. Horsky: I am not challenging that.

The Court: You can, and you can accompany him, or somebody else, with those letters to the Post Office to see that they are deposited in the mail.

Mr. Horsky: Let me suggest to you the difficulty I see in this.

The Court: The difficulty that I see is that there are competitors of ASCAP, and what you are asking for at this time is a publication of a confidential list which may result in their harm and damage. It will not work out, and you must remember too, that I have no power at this time to [fol. 706] direct that these steps be taken.

Mr. Horsky: I understand that.

The Court: I am simply suggesting it, and the Society, represented by Mr. Dean, is accepting my suggestion.

Mr. Horsky: May we then have the power to examine the membership list at the ASCAP office?

The Court: No, I would not permit that at this time.

Mr. Horsky: Isn't that unfair, your Honor?

The Court: No, I don't like that expression, and that is something that just rubs me the wrong way.

Mr. Horsky: I am sorry.

The Court: I try to be exceptionally fair. I have no interest in this business. I have nobody connected with me in the remotest degree who has any copyrighted songs, any interest in any music publication society or company or corporation. I am trying to look at this from an impartial point of view. At the same time I am trying to protect the members of the Society.

I realize my limitations here. I have no power at this time to direct these things. I am simply asking that it be done, and I am very happy that I am getting the cooperation that I really feel I should get.

[fol. 707] Mr. Horsky: Fine.

The Court: And I know that I will get the same from you, too.

Mr. Horsky: Thank you, sir. You certainly will.

One more point. There are two types of votes which will

result from this. One will be the weighted vote and one will be the non-weighted vote.

The Court: It will ultimately be that way, but there will be one vote that comes in from the members, for or against. They will be tabulated first on a purely numerical basis. Then they will be tabulated on the weighted basis. So there will be one vote with two calculations made from the one set of returns. That is what I contemplate.

Mr. Dean: Technically, your Honor, there will be three—

Mr. Horsky: Pardon me. I wanted to ask the Judge. May I continue with that question, sir?

The Court: There will be really four because there will be one for the writers, one for the publishers.

Mr. Dean: And one to amend the Articles of Association.

The Court: All right.

[fol. 708] Mr. Horsky: The problem, your Honor, arises from the fact that a publisher sometimes consists of a group of affiliated companies which in effect would give some publishers a weighted vote if you counted each of the affiliates.

The by-laws of the Association do not permit any single representative of a group of affiliated publishers more than one member to serve on the board of directors and I think that same affiliation limitation should apply to the non-weighted vote.

The Court: No, I am not going to do that. I am not going to ask them to do that. I want to find out how many of these 6,400 members are in favor of this and how many are opposed. Then I want also to know what the weighted vote is in favor and what it is against.

I think that is about all you can ask here, and I think if you ask more you might get less. So you had better leave it go in this way. I think you have done very well, Mr. Horsky. You got \$1,000 to send out the circular, and Mr. Finkelstein will be supervising it personally, and you will be assured of a fair shake from him, in plain language, and I have great faith in him, implicit faith in him.

Mr. Eastman: There is a sharp distinction between a [fol. 709] publisher and a writer and I would like to amend that suggestion to submit to the writer a separate communication.

The Court: No. We will send out one communication to both. Don't make it too complicated. That is one of the lawyer's faults.

All right, now, Mr. Dean, have you anything to say?

Mr. Dean: Nothing further.

The Court: The next point is when can you send this out and when will you hold your meeting and when do you want me to say come back here and let me see you get it? Or do you want to hold that in abeyance? I think it would be best if everybody knows when this thing is going to start rolling.

Mr. Dean: On the basis of the September 30, 1957, figures I would think, subject to correction from Mr. Finkelstein, that we could do this within two weeks.

Mr. Finkelstein: No.

The Court: More than that?

Mr. Finkelstein: The members have 20 days—the ballot has to be in the mail for 20 days.

Mr. Dean: I am talking about sending it out.

The Court: To get the thing moving.

[fol. 710] Mr. Finkelstein: We have to have two meetings, one in California and one here, to discuss it.

Mr. Dean: That's right.

When could we put this in the mail?

Mr. Finkelstein: Two weeks easily.

[fol. 711] Mr. Dean: That is my first question. My second question is when can you hold your Los Angeles meeting and when your New York meeting.

Mr. Stanley Adams: That would depend a great deal upon our ability to get a reservation at one of the hotels because they are booked quite a bit in advance. I would not at the present moment be able to tell you. I can tell you after exploration tomorrow or the next day.

Mr. Dean: When would you contemplate actually holding the members' meeting, the date of the meeting?

Mr. Adams: I would say the West Coast meeting should be within the next three weeks, as an outside figure, and the East Coast meeting should be a week later.

The Court: All right.

Mr. Eastman: May I inquire what the purpose of this meeting is?

The Court: To comply with the by-laws. The by-laws say that on any vote of this type there must be a meeting in these two localities.

Is that correct, Mr. Finkelstein?

[fol. 712] Mr. Finkelstein: That is correct, sir.

The Court: That is my recollection.

Mr. Eastman: Are we to be confined to your Honor's suggestion that we simply have a statement of what the question is?

The Court: If you are a member you can go there to those meetings and make yourselves heard. If you cannot get yourself heard, you had better get hold of Brother Battle and he will battle his way in.

Mr. Battle: 'Certainly will, Judge.

Mr. Dean: I think the answer to your Honor's question, then, is that we can hold these meetings within approximately six to seven weeks.

The Court: All right. Then you could come back here—it will have to be early in January, won't it?

Mr. Dean: Yes.

The Court: Do we have a calendar available?

How about January 6, Wednesday?

Mr. Dean: Agreeable to us, your Honor.

The Court: Does anybody have any objection to January 6th, Wednesday, at 10 o'clock?

Mr. Kaufman: Judge, one question, if I may.

At these meetings will counsel be permitted to be heard [fol. 713] in opposition to the decree?

The Court: You mean which meetings?

Mr. Kaufman: At these membership meetings.

The Court: I think you had better let the members do their own talking.

Mr. Kaufman: Except that the board will have their counsel address the members as they have in the past.

The Court: I think it would be better to let the members do their own talking. I am not going to undertake to permit the long series of speeches by lawyers. The members of this Society are not ignorant men by any means. They are business men. They are able to take care of themselves and express their ideas.

Mr. Kaufman: Will the Society at least permit us to be present? They have excluded us in the past.

The Court: I think you are entitled to be present, yes. A lawyer is entitled to be present if he does not obstruct the meeting, but not to be heard. You certainly can go in there with your client. I don't see any objection to that. [fol. 714] Mr. Kaufman: Can we have that permission?

The Court: I would suggest that that be granted.

Mr. Dean: That is agreeable to us, your Honor.

The Court: Maybe they will serve a little tea and sandwiches.

All right. I would suggest that it be granted, but I don't think that we should turn this into a forum where forty different lawyers get up. That won't promote harmony. If any member wants to get up, he should be afforded a reasonable opportunity to do so.

Mr. Kaufman: I think we can agree on one to speak in opposition. Will that courtesy be extended to us?

The Court: I wouldn't say lawyers. I would prefer to keep the lawyers out of that meeting.

Mr. Kaufman: Supposing Mr. Dean addresses the meeting in favor. Shouldn't there be some opposition then?

The Court: I think Mr. Dean has a right to do that because he is the lawyer for the corporation. He is the lawyer for the Society.

[fol. 715] Mr. Kaufman: But we are all guilty of one thing here.

The Court: All I can do is make a suggestion. When you are getting something, don't look a gift horse too close in the mouth. He might bite you.

Is there anything else that you have, Mr. Dean?

Mr. Dean: Nothing further.

The Court: Is there anything that you have, Mr. O'Donnell?

Mr. O'Donnell: The Government appreciates the Court's patience and courtesy.

The Court: Does anybody else here have anything else to say? If you do, say it now or forever keep your silence.

Does anybody want to be heard? All right.

Mr. O'Donnell: May I change one position before the record closes?

Yesterday I advocated rather violently that the man who watches the survey should be a mathematician. I want to tell you that overnight we have been thinking about your [fol. 716] Honor's suggestion and we have now come around to the view that it would perhaps be better if he were a business man of experience or a lawyer, as the Court suggested.

The Court: All right. I have not spoken to either Senator Ives or Judge McGeehan, and they might both hit me on the head, but I have in mind men of that type who have public confidence and who I know are above reproach and have a practical approach to all these things.

Mr. Eastman: Your Honor, I would just like to say that the writers committee wholeheartedly concurs with your suggestion of an overseer of the type mentioned. We are delighted with the suggestion.

Mr. Rothstein: I am not entirely clear on this, your Honor. Will voting by mail be permitted by those who do not attend the meetings?

Mr. Dean: Yes.

The Court: This meeting that is held out West and back East is a meeting that is required to be held by the by-laws at which the members may be present to ask questions and express their views. Lawyers may not talk at that meeting but their clients may.

All right.

[fol. 717] I think, for instance, the little paper that was read here from Mr. Lopez, was very expressive of his views and his feelings.

You might prepare a similar paper for your client to read, if you want.

Mr. Dean: May we thank your Honor for your patience.

The Court: Thank you, gentlemen. I hope you all give this much thought.

[fol. 718]

[File endorsement omitted]

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

[Title omitted]

ORDER DENYING MOTION OF SAM FOX PUBLISHING CO.
FOR LEAVE TO INTERVENE—November 16, 1959

Upon the motion for intervention of Sam Fox Publishing Company, Inc., Movietone Music Corporation, Pleasant Music Publishing Corporation, and Jefferson Music Company, Inc., dated October 13, 1959, the Pleading in Intervention submitted therewith, the Order of this Court dated June 29, 1959, together with the Proposed Consent Further Amended Final Judgment, the proposed Writers' Distribution Plan and the proposed Weighting Formula submitted therewith, the Amended Final Judgment entered March 14, 1950, and upon mailings to the membership of the American Society of Composers, Authors and Publishers dated July 10, 1959, July 21, 1959, August 26, 1959, September 4, 1959, October 5, 1959 and October 9, 1959, with proof of the service thereof; and

Having heard Charles A. Horsky, Esq., attorney for said applicants, in support of said motion pursuant to Federal Rule of Civil Procedure 24(a), subparagraph (2) or, in the alternative, pursuant to Rule 24(b), subparagraph (2); and as a friend of the court in opposition to the Proposed Consent Further Amended Final Judgment; and

Having heard Richard B. O'Donnell and Walter K. Bennett, attorneys for the plaintiff, and Arthur H. Dean, Esq., attorney for defendants in support of said Proposed Consent Further Amended Final Judgment; and

[fol. 719] Having found that representation of the public and the applicants by the Department of Justice was adequate and in the public interest; that applicants are members of and are represented by the Society with their consent; that applicants have permitted this cause in which they are not named as parties to proceed to judgment; and that it would not promote the interests of the administra-

tion of justice to permit the requested intervention, it is hereby

Ordered That:

Applicants' motion for leave to intervene is in all respects denied.

Dated: November 16th, 1959.

Sylvester J. Ryan, Chief Judge.

[fol. 721]

[File endorsement omitted]

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

[Title omitted]

AFFIDAVIT OF EDWARD ROSENBERG AS TO MAILING
DOCUMENTS—Filed November 18, 1959

State of New York
County of New York ss.:

Edward Rosenberg, being duly sworn, deposes and says:

I am over twenty-one years of age and am employed by the American Society of Composers, Authors and Publishers (hereinafter "ASCAP"). My duties include the supervision of mailing documents to the members of ASCAP.

Exhibit "A" hereto attached is a copy of a Notice of a Special Meeting to be held in Los Angeles on November 11, 1959, dated November 2, 1959, addressed to the West Coast members of ASCAP, and signed by Deems Taylor, Secretary of ASCAP.

Exhibit "B" hereto attached is a copy of a Notice of a Special Meeting to be held in New York on November 24, 1959, dated November 2, 1959, addressed to all members of ASCAP, and signed by Deems Taylor.

Exhibit "C" hereto attached is a copy of a letter, dated November 2, 1959, addressed to the members of ASCAP, and signed by Stanley Adams, President of ASCAP.

Exhibit "D" hereto attached is a pre-paid postcard, addressed to ASCAP, with provision therein for indicating whether a member will attend the Special Meeting in Los Angeles on November 11, 1959.

[fol. 722] Exhibit "E" hereto attached is a pre-paid postcard, addressed to ASCAP, with provision therein for indicating whether a member will attend the Special Meeting in New York on November 24, 1959.

Exhibit "F" hereto attached is a copy of a booklet containing (1) a letter dated November 4, 1959, addressed to all members of ASCAP, and signed by Stanley Adams, and (2) proposed amendments to the ASCAP Articles of Association.

On November 2, 1959, envelopes were addressed to all members of ASCAP by running them through the ASCAP addressograph. Thereafter all such envelopes bearing addresses located in the State of California were sorted out. Into each of the envelopes so selected were inserted one copy each of the documents attached hereto and marked Exhibit "A", Exhibit "B", Exhibit "C", Exhibit "D" and Exhibit "E", and no other documents or material. On November 2, 1959, at approximately 9:10 P.M. and on November 3, 1959, at approximately 6:00 P.M., all the envelopes so selected, securely sealed and postpaid, air mail, first class, were mailed at the Grand Central Station Branch of the New York Post Office.

On November 3, 1959, into each of the above envelopes bearing addresses other than those located in the State of California were inserted one copy each of the documents attached hereto and marked Exhibit "B", Exhibit "C" and Exhibit "E". On November 3, 1959, at approximately 10:15 P.M., all such envelopes, securely sealed and postpaid, first class, were mailed at the Grand Central Station Branch of the New York Post Office.

[fol. 723] On November 4, 1959, envelopes were addressed to all members of ASCAP by running them through the ASCAP addressograph. Thereafter all such envelopes bearing addresses located in the State of California were sorted out. Into each of the envelopes so selected was inserted one copy of the document attached hereto and marked Exhibit "F", and no other documents or material.

On November 4, 1959, at approximately 8:00 P.M., all the envelopes so selected, securely sealed and postpaid, air mail, first class, were mailed at the Grand Central Station Branch of the New York Post Office.

Edward Rosenberg

Sworn to before me this 16th day of November, 1959.

Henry Hofschuster, Notary Public, State of New York,
No. 03-6934300. Qualified in Bronx County, Certificate filed
in New York County, Commission Expires March 30, 1960.

(Seal)

[fol. 724]

EXHIBIT "A" TO AFFIDAVIT

MURRAY HILL 8-8800 Cable Address: ASCAP, New York

AMERICAN SOCIETY OF COMPOSERS,
AUTHORS AND PUBLISHERS575 Madison Avenue
New York 22, New York

November 2, 1959

MEMBERS ON THE WEST COAST

A Special Meeting of the West Coast Members of the Society will be held on November 11, 1959, at 8:00 P.M. at the Beverly Hilton Hotel, Beverly Hills, California.

At the last West Coast meeting, the proposed Consent Order further amending the 1950 ASCAP consent decree, was explained to the membership.

It was also stated that if the proposed Consent Order was approved by Chief Judge Sylvester J. Ryan, proposed amendments to the Articles of Association would be submitted to the members for their approval.

On October 19 and 20, 1959, hearings on the proposed Consent Order were held in New York before Chief Judge Sylvester J. Ryan of the United States District Court for the Southern District of New York. At that time, the hearing was adjourned to January 6, 1960, pending a vote by the members on the proposed Consent Order and the amendments to the Society's Articles of Association necessary to bring them into conformity with the proposed Consent Order.

The proposed Consent Order and the proposed amendments to the Articles of Association of the Society will be discussed at the meeting. You have already received a copy of the proposed Consent Order.* The proposed amend-

* If you wish an additional copy of the proposed Consent Order please write us.

ments to the Articles of Association will be sent to you in advance of the meeting.

The subject matter of the meeting is outlined at greater length in the accompanying letter from Stanley Adams, President of the Society.

Any member who so desires may be accompanied at the meeting by his lawyer. However, only the members themselves will be permitted to address the meeting. Anyone desiring to have his lawyer present should supply the name and address of the lawyer on the enclosed card.

Sincerely yours,

DEEMS TAYLOR
Secretary

[fol. 725]

EXHIBIT "B" TO AFFIDAVIT

Murray Hill 8-8800 Cable Address: ASCAP, New York

AMERICAN SOCIETY OF COMPOSERS,
AUTHORS AND PUBLISHERS575 Madison Avenue
New York 22, New York

November 2, 1959

To All Members of the Society:

A Special Meeting of the Society will be held on November 24, 1959, at 8:00 P.M. at the Hotel Edison, 228 West 47th Street, New York, New York.

At the last meeting in New York, the proposed Consent Order further amending the 1950 ASCAP consent decree, was explained to the membership.

It was also stated that if the proposed Consent Order was approved by Chief Judge Sylvester J. Ryan, proposed amendments to the Articles of Association would be submitted to the members for their approval.

On October 19 and 20, 1959, hearings on the proposed Consent Order were held in New York before Chief Judge Sylvester J. Ryan of the United States District Court for the Southern District of New York. At that time, the hearing was adjourned to January 6, 1960, pending a vote by the members on the proposed Consent Order and the amendments to the Society's Articles of Association necessary to bring them into conformity with the proposed Consent Order.

The proposed Consent Order and the proposed amendments to the Articles of Association of the Society will be discussed at the meeting. You have already received a copy of the proposed Consent Order.* The proposed amend-

* If you wish an additional copy of the proposed Consent Order please write us.

ments to the Articles of Association will be sent to you in advance of the meeting.

The subject matter of the meeting is outlined at great length in the accompanying letter from Stanley Adams, President of the Society.

Any member who so desires may be accompanied at the meeting by his lawyer. However, only the members themselves will be permitted to address the meeting. Anyone desiring to have his lawyer present should supply the name and address of the lawyer on the enclosed card.

Sincerely yours,

DEEMS TAYLOR
Secretary

[fol. 726]

EXHIBIT "C" TO AFFIDAVIT

Murray Hill 8-8800 Cable Address: ASCAP, New York

AMERICAN SOCIETY OF COMPOSERS,
AUTHORS AND PUBLISHERS575 Madison Avenue
New York 22, New YorkSTANLEY ADAMS
President

November 2, 1959

Dear Fellow Member of ASCAP:

As you recall, we sent you copies of a proposed Consent Order modifying the 1950 ASCAP Consent Decree, as well as memoranda of special counsel explaining it, and advised you that a hearing would be held on this proposed Order before Chief Judge Ryan in the Federal District Court in New York on October 19. That hearing took place on October 19 and 20.

At the hearing, the lawyers representing the Department of Justice presented the proposed Consent Order to the Court and stated that it had their complete approval. At the end of the presentation, the following colloquy occurred:

"The Court: . . . I understand now that it is the considered judgment of the Antitrust Division of the Attorney General's office that this proposed amended decree is the best in their judgment that can today be devised and framed.

"Mr. Bennett [of the Department of Justice]: That is my understanding, your Honor; that the alternative would be litigation on the subject.

"The Court: And that your Department recommends it to the Court without reservation of any kind.

"Mr. Bennett: That is correct, your Honor." (Transcript of hearing, pages 100-101)

Thereafter, the Court asked Arthur H. Dean, as counsel for ASCAP:

"The Court: . . .

Ther point involved here is do you feel, Mr. Dean, representing the Society, that you have accomplished the best possible results in light of the purposes of [fol. 726a] this suit for the Society as a whole and for its individual members?

"Mr. Dean: Yes, your Honor, I do. I can answer that unqualifiedly yes." (Transcript, pages 110-111)

The Court then heard those members who had objections to various provisions of the Consent Order.

In connection with these objections, Judge Ryan observed that the alternatives before him were to approve the proposed Consent Order as submitted to him by the Department of Justice and ASCAP, or to disapprove it.

Judge Ryan pointed out that, if he disapproved the proposed Consent Order, the consequence might be a trial which "perhaps may result in an order of dissolution" of ASCAP. (Transcript, page 271)

At the end of this hearing, Judge Ryan noted that (as provided in Article VII of the proposed Consent Order) ASCAP could not unconditionally agree to the proposed Consent Order until a vote was taken among the members of ASCAP to amend the Articles of Association so as to make them consistent with the requirements of the proposed Order. Judge Ryan then suggested that the hearing be adjourned to January 6, 1960, so that this vote could be taken.

In addition to taking the vote to amend the Articles of Association as required by the existing Articles of Association and as contemplated by the proposed Order, Judge Ryan further suggested that the members also be asked to express their approval or disapproval of the proposed Order itself in its entirety.

It should therefore be clearly understood that a vote in favor of the proposed Consent Order as a whole, weighted in accordance with the existing Articles of Association,

shall also constitute a vote to amend the Articles of Association.

Judge Ryan further suggested that for his information the vote on the proposed Consent Order be taken on a "yes" or "no" basis and that the vote be tabulated in two ways:—first, on the weighted number of votes each member now has under the existing Articles of Association; and, second, on a numerical basis.

Judge Ryan indicated that he considered that the proposed Consent Order represented definite improvements [fol. 726b] over existing procedures, and that if the lawyers for ASCAP come back and say that they consent to these modifications of the 1950 decree with the approval of the membership, he would be inclined to give his approval.

Judge Ryan further stated:

"While individual members may have objection to one particular subdivision of the decree they may feel that others are advantageous and desirable and that on an overall basis they will take the bad with the good to accomplish an overall improvement. That would be my idea." (Transcript, page 351)

The proposed Consent Order, together with the proposed amendments to the Society's Articles of Association (a copy of which will be sent to the members in advance of the meeting) will be discussed at the membership meetings on the West Coast on November 11, 1959 and in New York on November 24, 1959.

Let me be clear. The choice is whether to accept, in its entirety, the proposed Consent Order which was so carefully and patiently worked out between the Society and the Department of Justice, or to reject it in its entirety, with the possible consequence of a protracted, expensive and hazardous trial. In the interim, the operations of the Society would be greatly handicapped.

After the West Coast and New York meetings, ballots will be sent to the members to vote on whether they are for or against the proposed Consent Order and the proposed amendments to the Articles of Association.

It is extremely important that every member vote on these vital questions and express his opinion.

Your Board of Directors has unanimously approved the proposed Consent Order and unanimously recommends that the membership vote in favor of it, and consequently adopt the necessary amendments to the Articles of Association.

A vote in favor of the proposed Consent Order and the proposed amendments to the Articles of Association would in effect be a vote for the continuation of our Society on the basis of the 1950 Consent Decree as modified by the proposed Consent Order. A vote against the proposed Consent Order would in effect be a vote for a possible lawsuit by the Government against the Society, with the possibility of dissolution.

[fol. 726c] In this connection, I would like to call to your attention a statement made by Judge Ryan:

"The thought comes to my mind that if you people who are members of ASCAP can't agree amongst yourselves as to what is fair, when the Government has made an impartial study and recommends it, you might wind up with no association at all, and you will all have something to worry about." (Transcript, page 135)

I urge you to study this matter with care, and then to vote with full knowledge of and responsibility for the ultimate results of your vote.

Sincerely,

STANLEY ADAMS,
President

P.S.: A copy of the proposed Consent Order has previously been mailed to all members and a further copy will be mailed with the forthcoming ballots. However, if you wish an additional copy of the proposed Consent Order, please write us.

**AMERICAN SOCIETY OF COMPOSERS,
AUTHORS AND PUBLISHERS**

575 Madison Avenue
New York 22, New York

STANLEY ADAMS
President

November 4, 1959

To All Members of the Society:

Attached hereto are proposed amendments to the Society's Articles of Association, which the Society must adopt before it can finally agree to the proposed Consent Order which would further amend the Amended Final Judgment in *United States v. ASCAP*. These proposed amendments will be discussed at the Special West Coast Meeting on November 11, 1959 and the Special Membership Meeting in New York on November 24, 1959.

This memorandum briefly outlines the subject matter of the proposed amendments. Reference is made to the attached amendments themselves for the content of the proposed amendments.

Resigning Members

Article III, Section 14, entitled "Withdrawal From Membership," would be amended with respect to the rights of a resigning member to receive distributions for works licensed by the Society.

Board of Directors

Article IV, Section 4, would be amended to permit an election for the Board of Directors to take place, under the proposed amended voting provisions, at a time earlier than the Spring of 1961 when the next election would normally occur.

Nomination of Directors

Article IV, Section 4, relating to the nominations of candidates for the Board of Directors, would be amended to provide that, in addition to those candidates nominated by the committees on nominations, additional candidates may be nominated by 25 writer or publisher members, as the case may be.

Certain language changes would be made in Article IV, Section 4(d) in connection with the proposed amendment permitting a director or directors to be elected by a petition in advance of a general election (see discussion below).

Voting Provisions

Article IV, Section 4(h), which sets forth the basis for determining the number of votes of each member, would be amended so as to substitute new formulae for the allocation of votes.

Section 4(i) would be added to the voting provisions, to permit any group of writer or publisher members, as the case may be, representing one-twelfth of the votes of their class, to elect a director by submitting to ASCAP, 90 days or more before the date of any scheduled election for directors, a signed petition designating an eligible person as a director.

Distribution Rules

Article XIV, Section 6, relating to the Classification Committees, would be renumbered Section 6A. The last paragraph of this Section would be amended to provide that all rules and regulations affecting distributions to the members would be mailed to every member in the class thereby affected.

Distribution Protests

Article XIV, Section 6B, governing the procedure by which a member complains about his distributions, would be amended in several respects.

All distribution grievances would be submitted to a Board of Review in the first instance rather than to the respective Classification Committees. The Board of Review would replace the present Board of Appeals.

Appeals from all decisions of the Board of Review could be taken to an impartial panel of the American Arbitration Association.

The proposed amendments set forth the details for protest and review.

Composition of the Board of Review

The rules governing the composition of the Board of Review and the method of electing its members, which are set forth in Article XIV, Section 6C, would be the same as those now applicable to the Board of Appeals, except that the proposed voting formulae for electing directors would also be used to determine the votes for electing members of the Board of Review.

The Board of Directors unanimously recommends the approval of these amendments.

Sincerely yours,

STANLEY ADAMS, *President*

**PROPOSED AMENDMENTS TO ARTICLE III, SECTION 14;
ARTICLE IV, SECTION 4, PREAMBLE, AND SUBDIVISIONS
(d), (h), and (i); ARTICLE XIV, SECTIONS 6, 6A, 6B, and 6C
OF THE ARTICLES OF ASSOCIATION**

**Comparison of Existing Provisions of
Articles of Association
with
Proposed Amendments**

**EXISTING PROVISIONS (with lines drawn
through matter to be deleted)**

Article III, Section 14:

"Section 14: Any member may withdraw from membership in the Society at the end of any fiscal year upon (1) giving three months' advance written notice to the Society, and (2) agreeing that his resignation shall be subject to any rights or obligations existing between the Society and its licensees under then existing licenses. Subject to the above, such withdrawal shall terminate all existing assignments and the member's relationship with the Society, except that ~~the withdrawing member shall be entitled to a proportionate share of distributions from royalties accruing under existing licenses to the extent that such distributions are made solely on the basis of performances as shown in the survey of performances made by or for the Society.~~

**PROPOSED AMENDMENTS (new matter
italicized)**

Article III, Section 14:

"Section 14. Any member may withdraw from membership in the Society at the end of any fiscal year upon (1) giving three months' advance written notice to the Society, and (2) agreeing that his resignation shall be subject to any rights or obligations existing between the Society and its licensees under then existing licenses. Subject to the above, such withdrawal shall terminate all existing assignments and the member's relationship with the Society, except that *a withdrawing member whose works continue to be licensed by ASCAP by reason of the continued membership of a co-writer, writer or publisher of any such works, may elect to continue receiving distribution for such works on the same basis and with the same elections as a member would have, so long as the resigning member does not license the works to any other performing rights licensing organization for performance in the United States. The Society may require a written acknowledgment from such resigning member that the works have not been so licensed. In any event, a resigning member shall receive distribution from the Society on the basis of performances made under licenses in effect at the time of the member's resignation. Anything to the contrary notwithstanding, the Society may, at its option, deny resigning members the right to receive payment on any basis other than a current performance basis, provided that such option must be exercised as to all resigning members alike.*

EXISTING PROVISIONS (continued)

Article IV, Section 4:

"Section 4. Members of the Board of Directors shall be elected in the following manner commencing with the year 1955, and in each alternate year thereafter:

.

"(d) Each committee on nominations shall promptly select and nominate from the general membership one candidate for each publisher directorship and two candidates for each writer directorship ~~the term of which is currently expiring~~. It shall secure the consent of such candidates to stand for the office and shall also automatically regard the incumbent of the ~~expiring~~ directorship as a candidate for re-election unless by him otherwise instructed in writing. If any publisher member incumbent shall fail to stand for re-election then two candidates instead of one shall be nominated for his office."

.

"(h) Voting rights of all members within their respective classes in Elections of Directors, shall be upon the following basis (but no member entitled to vote shall have less than one vote in any event):

Composer-Author Members

"One (1) vote for each \$20 or major fraction thereof received during the previous calendar year as participation in

PROPOSED AMENDMENTS (continued)

Article IV, Section 4:

"Section 4. Members of the Board of Directors shall be elected in the following manner commencing with the year 1961, and in each alternate year thereafter (except that the election which would otherwise occur in 1961 may be held at an earlier time if the Board of Directors so determines and the members so elected shall serve until the election of their successors in the year 1965):"

.

"(d) Each committee on nominations shall promptly select and nominate from the general membership one candidate for each publisher director and two candidates for each writer director to be elected in the general election. It shall secure the consent of such candidates to stand for the office and shall also automatically regard each incumbent director as a candidate for reelection unless by him otherwise instructed in writing. If any publisher member incumbent shall fail to stand for re-election then two candidates instead of one shall be nominated for his office.

"In any election for the Board of Directors the nominees for Directors shall include, in addition to those nominees chosen by the Nominating Committees, any person eligible to be a Director who is designated by a petition subscribed to by 25 or more of the members of the Society entitled to elect such Director. Any such petition designating a candidate must be submitted to the Society in writing at least 10 days prior to the selection and nomination of candidates by the Nominating Committees."

.

"(h) Voting rights of all members within their respective classes in Elections of Directors, shall be determined upon the following basis, subject to the limitation that no member shall have more than 100 votes:

Composer-Author Members

"Each composer or author member who has received any performance credits in the latest available preceding fiscal survey

EXISTING PROVISIONS (continued)

the Society's distributions of domestic royalties excluding all sums received as prize awards.

Publisher Members

"One (1) vote for each \$500 or major portion thereof received during the previous calendar year as participation in the Society's distributions of domestic royalties."

PROPOSED AMENDMENTS (continued)

year shall have one vote, plus (i) one vote for each 1,000 credits up to 20,000 credits, plus (ii) one vote for each 2,000 credits from 20,001 to 26,000 credits, plus (iii) one vote for each 3,000 credits from 26,001 to 35,000 credits, plus (iv) one vote for each 4,000 credits from 35,001 to 51,000 credits, plus (v) one vote for each 5,000 credits from 51,001 to 101,000, plus (vi) one vote for each 6,000 credits in excess of 101,000 credits.

Publisher Members

"Each publisher member who has received any performance credits in the latest available preceding fiscal survey year shall have one vote, plus (i) one vote for each 4,000 credits up to 100,000 credits, plus (ii) one vote for each 8,000 credits from 100,001 credits to 140,000 credits, plus (iii) one vote for each 12,000 credits from 140,001 to 200,000 credits, plus (iv) one vote for each 16,000 credits from 200,001 to 408,000, plus (v) one vote for each 20,000 credits in excess of 408,000 credits.

"The above formulae shall be kept current in the following manner. The number of writer and publisher performance credits respectively yielded by the Society's survey ended September 30, 1958 shall be calculated. This number shall be divided into the number of writer and publisher performance credits respectively yielded by the survey in the latest available fiscal survey year preceding the election in question. The resulting figures, rounded to the nearest tenth, for the writer members and publisher members respectively, shall be used as multipliers on each of the numbers above which is underlined.

"If at any time more than 40.8% of the total publisher votes would be represented by the ten publisher members and 'groups of affiliated publisher members' (as that term is used in Article IV, Section 1 hereof) having

EXISTING PROVISIONS (continued)

(i) (No existing provision)

Article XIV, Section 6:

Each such Committee shall set forth in writing the general basis of member classification which shall be made available to any member upon request.

Section 6A. Protest to Classification Committees. Any member, aggrieved by his classification may, after any distribution,

PROPOSED AMENDMENTS (continued)

the highest number of publisher votes, the weighting of votes as set forth in the above formula for publisher members shall be changed to bring the percentage of votes of such publishers down to 40.8%. This shall be accomplished by proportionately diminishing the votes otherwise allocable to such publishers by the amounts necessary to effect such result. Anything to the contrary notwithstanding, a publisher member which is not subject to such diminution of its votes shall not be allocated more votes than any publisher member which is subject to such diminution.

"A member who received no performance credits in the latest available fiscal survey year shall not be entitled to vote in an Election for Directors."

"(i) Notwithstanding the provisions contained in subsection (f) of this Section 4, any group of writer members entitled to cast one-twelfth of the votes of all writer members, or any group of publisher members entitled to cast one-twelfth of the votes of all publisher members, may elect any eligible person a Director by signing a petition and presenting such petition to the Society at least 90 days before the date of any scheduled election for Directors. In such event, the number of Directors to be elected in the general election shall be reduced by the number of Directors so elected by petition and all members signing such petition shall not be entitled to vote in the general election or to sign more than one petition in advance of any general election."

Article XIV, Section 6 will be renumbered Section 6A:

"Each such Committee shall set forth in writing the general basis of member classification, which shall be mailed to every member in the class thereby affected."

file a protest in writing with the Classification Committee having jurisdiction over his classification. It shall be the duty of the Classification Committee to hear such member and to accept from him all papers in evidence submitted to the Committee. The Committee shall have the power to make rules respecting hearings upon such protests, with full power to appoint a subcommittee to investigate such protest.

"The Committee shall make its decision within thirty days from the date of filing the protest. Such decision shall be conclusive and final unless the member shall file an appeal in the manner hereinafter prescribed."

Article XIV, Section 6B:

"Section 6B. ~~Appeals From Classification.~~ Any member who is dissatisfied with the decision of the Classification Committee may give notice in writing to the Secretary of the Society within thirty days thereafter, stating that he proposes to appeal to the Board of Appeals; the Board of Appeals shall entertain his appeal and give him an opportunity to appear in person, or by any other person of his own selection, including a member of the Society, if he so desires, or to present his appeal in writing or both; any one or more members of the Classification Committee may likewise appear in person on such appeal; the decision of such Board of Appeals shall be deemed final unless either the member or the Classification Committee files a notice of appeal in writing with the Secretary of the Society within thirty days after receiving written notice of such decision of the Board of Appeals; in such case all evidence taken before the Board of Appeals shall be referred to the Panel provided for in Section 6D of this Article XIV.

Article XIV, Section 6B:

"Section 6B. *Protests.* Any member, aggrieved by the distribution of the Society's revenues to such member, or by any rule or regulation of the Society directly affecting the distribution of the Society's revenues to such member, may give notice to that effect in writing to the Secretary of the Society, stating that he proposes to protest to the Board of Review and setting forth the grounds for his complaint. The Board of Review shall entertain his complaint and give him an opportunity to appear in person, or by any other person of his own selection, including a member of the Society, if he so desires, or to present his complaint in writing or both; any one or more members of the applicable Classification Committee may likewise appear in person on such complaint.

"The Board of Review shall set forth in detail its findings of fact and the grounds of its decision. Stenographic transcripts of each proceeding before the Board of Review shall, at the request of any member, be supplied by the Society to such member at cost. If the Society itself requires or makes use of the transcript, the member shall pay only the cost of making a second copy.

"The decision of the Board of Review shall be deemed final unless either the mem-

EXISTING PROVISIONS (continued)

"The Panel, after considering any such appeal, may reverse the decision of the Board of Appeals and determine the classification of such member by a vote of not less than two-thirds of the Panel and in its discretion may impose costs. If less than two-thirds of the Panel vote for reversal, the decision of the Board of Appeals shall be affirmed. The decision of the Panel shall be conclusive and final. No member shall have the right to take an appeal to the Board of Appeals or to the Panel more than once during each calendar year. In case of a reclassification of a member, such reclassification shall not be retroactive but shall become effective on the succeeding distribution.

PROPOSED AMENDMENTS (continued)

ber or the Classification Committee files a notice of appeal in writing with the Secretary of the Society within thirty days after receiving written notice of such decision; in such case all evidence taken before the Board of Review shall be referred to the Panel provided for in Section 6D of this Article XIV.

"The Panel, after considering any such appeal, may reverse or modify the decision of the Board of Review by a vote of not less than two-thirds of the Panel and in its discretion may impose costs. If less than two-thirds of the Panel vote for reversal or modification, the decision of the Board of Review shall be affirmed. The decision of the Panel shall be conclusive and final.

"On appeal to the Panel from an adverse decision of the Board of Review, the appellant may seek to have the order, rule or regulation involved properly interpreted or applied, to have errors rectified, or to void such rule or regulation on grounds of its discriminatory or arbitrary character. Any additional amounts finally determined by the Board of Review (or, in case of appeal, by the Panel) to be due a member with respect to the distribution complained of by such member and all subsequent distributions to the date of the decision shall be paid to the member promptly after the rendering of such decision.

"Any complaint by a member pursuant to this Section 6B must be filed by the aggrieved member within nine months of the receipt by him of his annual statement or of the rule or regulation on which such complaint is founded and the relief which the Board may grant in terms of monetary payment shall not extend back beyond the period of time covered by such annual statement, provided, however, that if the alleged injustice is such that the aggrieved party would not reasonably be put on notice of it by his annual statement, the relief given may reach back as far as, in the opinion of the Board of Review, is required to do justice to all parties.

EXISTING PROVISIONS (continued)

"If any member of the Board of **Appeals** ~~should be dissatisfied with his classification~~, he shall have the right to **appeal** to the Board of Directors which for purposes of such **appeal** shall act as the Board of **Appeals**.

"In the event that the Board of **Appeals** or the Board of Directors, as the case may be, shall not reach a decision at the meeting at which any **appeal** shall be presented, a decision may be made at any subsequent meeting of such Board. All members of such Board present at the meeting at which the **appeal** is voted on shall be entitled to participate in the consideration and decision of such **appeal**."

Article XIV, Section 6C:

"Section 6C. Board of **Appeals**. (1) Commencing with the election in the year 1954, and in each alternate year thereafter, there shall be elected for a two-year period from the general membership a Board of **Appeals** consisting of three writer members (one of whom shall be a standard writer) and three publisher members (one of whom shall be a standard publisher). No member of the Board of Directors nor any representative of a publisher member affiliated with any publisher member (as defined in Article IV, Section 1) having a representative on the Board of Directors, shall be eligible to serve on the Board of **Appeals**. The three writer members shall be elected by all the writers and the three publisher members shall be elected by all the publishers.

"(2) Members of the Board of **Appeals** shall be elected in the following manner:

"(g) Publisher members only shall be entitled to vote for members of the Board of **Appeals** from this class and writer members only for members of the Board of **Appeals** from this class. All writer members whether

PROPOSED AMENDMENTS (continued)

"If any member of the Board of *Review* wishes to assert a grievance of the class described in this Section 6B, he shall have the right to *protest* to the Board of Directors which for the purposes of such *protest* shall act as the Board of *Review*."

"In the event that the Board of *Review* or the Board of Directors, as the case may be, shall not reach a decision at the meeting at which any *complaint* shall be presented, a decision may be made at any subsequent meeting of such Board. All members of such Board present at the meeting at which the *complaint* is voted on shall be entitled to participate in the consideration and decision of such *complaint*."

Article XIV, Section 6C (until such time as the provisions of proposed Section 6C shall become effective, the provisions of existing Section 6C shall continue to apply):

"Section 6C. Board of *Review*. (1) Commencing with the election in the year 1960, and in each alternate year thereafter, there shall be elected for a two-year period from the general membership a Board of *Review* consisting of three writer members (one of whom shall be a standard writer) and three publisher members (one of whom shall be a standard publisher). No member of the Board of Directors nor any representative of a publisher member affiliated with any publisher member (as defined in Article IV, Section 1) having a representative on the Board of Directors, shall be eligible to serve on the Board of *Review*. The three writer members shall be elected by all the writers and the three publisher members shall be elected by all the publishers.

"(2) Members of the Board of *Review* shall be elected in the following manner:

"(g) Publisher members only shall be entitled to vote for members of the Board of *Review* from this class and writer members only for members of the Board of *Review* from this class. All writer members, whether

EXISTING PROVISIONS (continued)

author or composer, shall be qualified to vote for writer members of the Board of ~~Appeals~~.

"(h) Voting rights of all members within their respective classes in elections of members of the Board of ~~Appeals~~ shall be upon the basis specified in subdivision (h) of Article IV, Section 4.

"(3) Four members of the Board of ~~Appeals~~ shall constitute a quorum and the affirmative vote of a majority of those present shall be required ~~to change the classification fixed by the Classification Committee~~. In the event of an equally divided vote, the Board of ~~Appeals~~ shall certify the ~~appeal~~ to the Panel and its decision shall be binding, final and conclusive.

"(4) The Chairman of the Board of ~~Appeals~~ (or in the case of a tie vote a member of the Board of ~~Appeals~~ representing each of the views of that body) may appear before the Panel upon any appeal from a decision of the Board of ~~Appeals~~ to the Panel.

"(5) In case of the death, removal or resignation of a member of the Board of ~~Appeals~~, such vacancy shall be filled by the election of a member belonging to the same class and division as the member whose place is to be filled, by a two-third vote of the entire Board, the term of office of such newly elected member to be for the balance of the term of the replaced member.

"(6) Members of the Board of ~~Appeals~~ as such shall not receive any salaries for their services except that each member in attendance at each meeting of the Board of ~~Appeals~~ within five minutes after the meeting has been called to order, shall receive the sum of \$25 as an attendance fee."

PROPOSED AMENDMENTS (continued)

author or composer, shall be qualified to vote for writer members of the Board of *Review*.

"(h) Voting rights of all members within their respective classes in elections of members of the Board of *Review* shall be upon the basis specified in subdivision (h) of Article IV, Section 4.

"(3) Four members of the Board of *Review* shall constitute a quorum and the affirmative vote of a majority of those present shall be required *for a decision pursuant to Section 6B of this Article XIV*. In the event of an equally divided vote, the Board of *Review* shall certify the *complaint* to the Panel and its decision shall be binding, final and conclusive.

"(4) The Chairman of the Board of *Review* (or in the case of a tie vote a member of the Board of *Review* representing each of the views of that body) may appear before the Panel upon any appeal from a decision of the Board of *Review* to the Panel.

"(5) In case of the death, removal or resignation of a member of the Board of *Review*, such vacancy shall be filled by the election of a member belonging to the same class and division as the member whose place is to be filled, by a two-third vote of the entire Board, the term of office of such newly elected member to be for the balance of the term of the replaced member.

"(6) Members of the Board of *Review* as such shall not receive any salaries for their services except that each member in attendance at each meeting of the Board of *Review* within five minutes after the meeting has been called to order, shall receive the sum of \$25 as an attendance fee."

[fol. 730]

[File endorsement omitted]

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

[Title omitted]

AFFIDAVIT OF ARNOLD SAEMANN AS TO MAILING
DOCUMENT—Filed November 18, 1959

State of New York
County of New York ss.:

Arnold Saemann, being duly sworn, deposes and says:

I am over twenty-one years of age and am employed by the American Society of Composers, Authors and Publishers (hereinafter "ASCAP"). My duties include the supervision of mailing documents to the members of ASCAP.

Exhibit "A" attached hereto is a copy of a booklet containing (1) a letter dated November 4, 1959, addressed to all members of ASCAP, and signed by Stanley Adams, and (2) proposed Amendments to the ASCAP Articles of Association.

On November 4, 1959, envelopes were addressed to all members of ASCAP by running them through the ASCAP addressograph. On November 5, 1959, one copy of Exhibit "A", and no other documents or material, was inserted into each of such envelopes, except those envelopes bearing addresses located in the State of California (see affidavit of Edward Rosenberg, dated November 16, 1959). At [fol. 731] approximately 5:00 P.M. on the same day all the aforescribed envelopes (i.e., excluding those bearing addresses located in the State of California); securely sealed and postpaid, first class, were mailed at the Grand Central Branch of the New York Post Office.

Arnold Saemann

Sworn to before me this 16th day of November, 1959.

Henry Hofschuster, Notary Public, State of New York.
No. 03-6934300, Qualified in Bronx County, Certificate filed
in New York County, Commission Expires March 30, 1960.

(Seal)

NOTE RE EXHIBIT "A" PURSUANT TO STIPULATION
OF COUNSEL AS TO PRINTING RECORD

"Attached to the above affidavit of Arnold Saemann was a booklet containing a letter dated November 4, 1959 signed by Stanley Adams, and proposed amendments to the AS-CAP Articles of Association which is identical to Exhibit F attached to the Affidavit of Edward Rosenberg dated November 16, 1959 which is printed elsewhere in this Record."

[fol. 733]

[File endorsement omitted].

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

[Title omitted]

ORDER DESIGNATING JEROME I. GOLINKO & Co. TO ASSIST IN
CONNECTION WITH VOTING—November 27, 1959

Upon the consent of the parties hereto, it is hereby

Ordered that Jerome I. Golinko & Co. is designated by the Court to assist Mr. Herman Finkelstein in connection with the vote of the members on the proposed Consent Order further amending the Amended Final Judgment entered herein on March 14, 1950, and on the proposed Amendments to the defendant's Articles of Association; and it is further

Ordered that Jerome I. Golinko & Co., under Mr. Finkelstein's direction, carry out the procedures set forth in Annex A hereto.

Sylvester J. Ryan, Chief Judge.

Dated: November 27, 1959.

Consented to:

Richard B. O'Donnell, Attorney for plaintiff.

Howard T. Milman, Attorney for defendant.

November 25, 1959

Procedures to be followed by
the direction of the Court.

DATES: November 24th—close voting lists at end of the day
November 29th—mail ballots
December 19th—remove final ballots from PO box
at midnight
January 6, 1960—tabulation of ballots in open
Court

A—VERIFICATION PROCEDURE:

1. Check publishers Payment Schedule for 1958 with ASCAP books of account, in total and for each publisher.
2. Check Writers Payment Schedule for 1958 with ASCAP books of account, in total and for individual writers on a test basis.
3. Check Publishers Voting List with Publishers Payment Schedule for votes on the basis of one vote for each \$500 of payment or major fraction thereof. Each publisher who has received no payment during 1958 to have one vote.
4. Check Writers Voting List with Writers Payment Schedule for votes on the basis of one vote for each \$20 of payment or major fraction thereof. Each writer who has received no payment during 1958 to have one vote.
5. Review procedure for last minute changes in voting lists for deaths, new memberships etc.
6. Determine number of eligible votes for Writers and for Publishers separately. Also determine total number of ballots to be mailed.

B—MAILING PROCEDURE:

(ASCAP will turn over to Jerome I. Golinko & Co. unsealed envelopes containing various data to be mailed to members including ballot)

1. Withdraw the ballot from the mailing envelope and check same to the voting list for

a: Number of votes

b: Ballot number

and then reinsert in the mailing envelope.

2. Check face of mailing envelope for name of member and compare with the voting list.
3. Follow up any envelopes that are not addressed with an Addressograph stencil plate.
4. Mark voting list that ballot has been mailed.

[fol. 735] 5. Keep envelopes in a locked room at ASCAP until November 28th.

6. On November 28th and 29th, run envelopes through mailing machine at ASCAP under the supervision of Jerome I. Golinko & Co. and place in mailing bags for which they will have locks and keys.
7. Tie up total pieces of mail run thru mailing machine with the total of ballots to be mailed as predetermined by Jerome I. Golinko & Co.
8. On November 29th sealed and locked mailing bags to be sent to the Post Office under supervision of Jerome I. Golinko & Co.

C—RECEIVING PROCEDURE:

(Mr. Mappen of Jerome I. Golinko & Co. has in his possession the PO box receipt and returned ballots will be removed from the PO box only by Mr. Mappen)

1. Return envelope containing the ballot will be opened by Jerome I. Golinko & Co. and the ballot will be removed. The return mailing envelope will be re-

tained. Ballot is not to be opened and tab is not to be removed. A record will be kept of the number of ballots received each day.

2. a. If a ballot is received with the tab sealed inside the ballot, the tab will be released only by Mr. Mappen and the ballot will be initialed and resealed by him.
- h. Any ballot which is received without a tab or which appears to be unsigned will be segregated and listed. If such ballot is received prior to 9 A.M. December 18, 1959, Jerome I. Golinko & Co. will mail a replacement ballot, appropriately marked, with a request that it be properly executed, and with notice that it must be received before midnight on December 19 in order to be counted.
- c. Ballots improperly executed shall be segregated and listed and separately submitted to the Court.
- d. No attempt need be made to determine the authenticity of signatures, or the right of the publisher's representative to sign for the publisher.
3. Imprint on the back of each ballot and on the back of each tab an identification number which will be different from the ballot number.
4. Check to the voting list the ballot number, Writers or Publishers name, and the number of votes as indicated on the tab of the ballot.
5. Mark voting list that ballot has been returned.
- [fol. 736] 6. Mark on the face of the unopened ballot the number of votes determined under 4 above.
7. Non-participating writers ballots will be marked with the letter "N" for purpose of the analysis required in tabulation.
8. Segregate ballots into groups specified in D 5 below.
9. Ballots to be stored in the custody of Jerome I. Golinko & Co., unopened until January 6, 1960, when they shall be produced in Court.

10. Mr. Mappen will personally remove any remaining ballots from the PO box at midnight on December 19th.
11. Mr. Mappen will subsequent to December 19th remove from the PO Box any ballots thereafter received. Those postmarked December 19th or earlier will be segregated and listed, and otherwise handled in the same manner as ballots received prior to midnight on December 19th. Ballots postmarked after December 19th will be segregated without opening the return mailing envelope.
12. Any ballots delivered to the ASCAP offices will be turned over daily to Mr. Mappen and then handled in the same manner as those received by mail but a record will be kept of any ballots so delivered.
13. Arrangements will be made by Mr. Finkelstein to receive delivery of ballots at the ASCAP office until midnight December 19th.
14. ASCAP will prepare a list of any members who die between November 24th and December 19th and the total number of eligible votes will be reduced for any such members who have died without voting.

D—TABULATING PROCEDURE:

(On January 6, 1960, ballots will be tabulated by Jerome I. Golinko & Co., in accordance with the directions of Judge Ryan, and in open court on that day.)

1. Any ballots on which a ruling is desired will be presented to the Court on January 6, 1960.
2. The ballots will be brought to the Court unopened.
3. Remove tabs from ballots.
4. Open ballots and check number of votes on the inside of the ballot with the number of votes written on the outside of the ballot as per C-6 above.

[fol. 737] 5. Ballots will have been segregated by classes as follows: (see C-8)

Writer members:

- (a) Non-participating members
- (b) Participating members with one vote
- (c) " " " 2 to 5 votes
- (d) " " " 6 " 25 "
- (e) " " " 26 " 50 "
- (f) " " " 51 " 100 "
- (g) " " " 101 " 250 "
- (h) " " " over 250 "

Publisher members:

- (aa) With one vote
- (bb) " 2 to 3 votes
- (cc) " 4 to 5 "
- (dd) " 6 to 10 "
- (ee) " 11 to 20 "
- (ff) " over 20 "

6. Tabulation of the foregoing groups will be done by two man teams so that there will be a double check on the tabulation as it proceeds. Ballots which have only one vote will merely be counted twice and the total of the checked count will be entered on the tabulation sheet.
7. All ballots will be tabulated as follows:
 - 1 "Yes" votes
 - 2 "No" votes
 - 3 Ballots returned but not marked either "yes" or "no"
8. Tabulation sheets will be summarized separately for Writers and Publishers to indicate the total vote on all ballots returned.
9. Reconcile total votes indicated by D-8 with total eligible votes for Writers and Publishers as determined under A-6 taking into consideration ballots disallowed and ballots not returned.

[fol. 749]

EXHIBIT 1 TO AFFIDAVITS

Mr. ☐
 " ☐
 " ☐

PLEASE NOTE AND

RETURN ☐FILE ☐ATTEND ☐SEE ME ☐PASS ON ☐

SULLIVAN & CROMWELL

FILE COPY.

CLIENT ASCAP

MATTER Antitrust

October 27, 1959.

Charles A. Horsky, Esq.,
 Messrs. Covington & Burling,
 Union Trust Building,
 Washington 5, D. C.

Dear Mr. Horsky:

Mr. Herman Finkelstein forwarded to me your letter of October 22, 1959. I note your request to be present when the ballots are opened.

With respect to the submission of statements to members, I do not believe that any particular member has any special interest in the communications sent out by the Society or its Board of Directors. The transcript of hearings before Judge Ryan pretty definitely spells out the procedures for a mailing by those who appeared at the hearing, and ASCAP will carry out its assurances to the Court in connection with such a mailing.

Very truly yours,

Arthur H. Dean.

[fol. 750]

EXHIBIT 2 TO AFFIDAVITS

COVINGTON & BURLING
UNION TRUST BUILDING

EDWARD B. BURLING
JOHN LORD O'BRIAN
DEAN G. ACHESON
NEWELL W. ELLISON
JOHN G. LAYLIN
H. THOMAS AUSTERN
FONTAINE C. BRADLEY
ALAN C. MAXWELL
HOWARD C. WESTWOOD
EDWARD BURLING, JR.
CHARLES A. HORSKY
GERHARD A. GESELL
JOEL EARLOW
HUGH B. COX
DONALD HISS
W. GRAHAM CLAYTOR, JR.

J. HARRY COVINGTON
JOHN T. SAPIENZA
W. CROSBY ROPER, JR.
NESTOR S. FOLEY
JAMES H. MC GLOTHLIN
DANIEL M. GRIBBON
ERNEST W. JENNES
HARRY L. SHNIDERMAN
EDWIN MC ELWAIN
STANLEY L. TEMKO
DON V. HARRIS, JR.
PAUL C. WARNKE
JAMES C. MC KAY
WILLIAM STANLEY, JR.
JOHN W. DOUGLAS
DAVID C. ACHESON

WASHINGTON 5, D. C.

October 29, 1959

Arthur H. Dean, Esq.
Sullivan & Cromwell
48 Wall Street
New York 5, New York

Dear Mr. Dean:

This will acknowledge your letter of October 27, 1959. In connection with the opening of the ballots, may I request that you advise me as far in advance as possible as to the date when the opening will take place so that I will not find myself in other engagements which will make it impossible to be present.

Very truly yours,

/s/ C. A. HORSKY

[fol. 751]

EXHIBIT 3. TO AFFIDAVITS

Mr. ☐
 " ☐
 " ☐

PLEASE NOTE AND

RETURN ☐
 FILE ☐
 ATTEND ☐
 SEE ME ☐
 PASS ON ☐

SULLIVAN & CROMWELL

FILE COPY

CLIENT ASCAP

MATTER Antitrust.

December 2, 1959

Charles Horsky, Esq.,
 Messrs. Covington & Burling,
 701 Union Trust Building,
 Washington, D. C.

Re: United States v. ASCAP

Dear Mr. Horsky:

In reply to your inquiry concerning the balloting procedures, I enclose a copy of an order relative to that matter signed by Chief Judge Ryan on November 27, 1959. A copy of that order was mailed to Mr. Cheyette on November 30, 1959.

With respect to the minutes of the meetings in Los Angeles on November 11, 1959 and in New York on November 24, 1959, the Society, of course, does not possess sufficient copies thereof to send to all interested members or their representatives. The Society would be pleased, however, to make a copy of the minutes of each of those meetings available for inspection by any member or his authorized representative at the ASCAP offices in New York City..

Very truly yours,

Arthur H. Dean

(Enclosure)

[fol. 753]

EXHIBIT 5 TO AFFIDAVITS

COVINGTON & BURLING
UNION TRUST BUILDING

EDWARD B. BURLING
JOHN LORD O'BRIAN
DEAN G. ACHESON
NEWELL W. ELLISON
JOHN G. LAYLIN
H. THOMAS AUSTERN
FONTAINE C. BRADLEY
ALAN C. MAXWELL
HOWARD C. WESTWOOD
EDWARD BURLING, JR.
CHARLES A. HORSKY
GERHARD A. GESELL
JOEL BARLOW
HUGH B. COX
DONALD HISS
W. GRAHAM CLAYTOR, JR.

J. HARRY COVINGTON
JOHN T. SAPIENZA
W. CROSBY ROPER, JR.
NESTOR S. FOLEY
JAMES H. MC GLOTHLIN
DANIEL M. GRIBBON
ERNEST W. JENNES
HARRY L. SHNIDERMAN
EDWIN MC ELWAIN
STANLEY L. TEMKO
DON V. HARRIS, JR.
PAUL C. WARNKE
JAMES C. MC KAY
WILLIAM STANLEY, JR.
JOHN W. DOUGLAS
DAVID C. ACHESON

WASHINGTON 5, D. C.

December 14, 1959

Arthur H. Dean, Esq.
Sullivan & Cromwell,
48 Wall Street
New York 5, New York

Dear Mr. Dean:

In order that I may be prepared properly to evaluate the votes to be counted on January 6, would you be good enough to supply for me the following information:

Between the dates of October 20 and November 24, 1959—the date when the vote was ordered and the date when the voting lists were closed—(a) how many non-participating members of the Society were granted participating status and (b) how many new members in either non-participating or participating status were admitted to the Society. It would also be helpful if I could also have the totals for the period from January 1 to October 19, 1959.

Very truly yours,

/s/ C. A. HORSKY

CAH/ws

[fol. 754]

EXHIBIT 6 TO AFFIDAVITS

SULLIVAN & CROMWELL

48 WALL STREET

NEW YORK 5

CABLE ADDRESS "LADYCOURT"

December 18, 1959

C
O
P
Y

Charles A. Horsky, Esq.,
Messrs. Covington & Burling,
Union Trust Building,
Washington 5, D. C.

Re: United States v. ASCAP

Dear Mr. Horsky:

Answering your inquiry of December 14, 1959, I am informed that, between October 20 and November 24, 1959, the number of members admitted was 22 writers and 29 publishers. The number of members advanced from non-participating to active during that period was 37.

Between January 1, 1959 and October 19, 1959, the number of members admitted was 487 writers and 213 publishers. The number of members advanced from non-participating to active during that period was 111.

Very truly yours,

Arthur H. Dean.

[fol. 761]

EXHIBIT 13 TO AFFIDAVITS

SULLIVAN & CROMWELL

48 WALL STREET

NEW YORK 5

CABLE ADDRESS "LADYCOURT"

October 27, 1959.

C
O
P
Y

Bernard Kaufman, Esq.,
Messrs. Kaufman and Kaufman,
570 Fifth Avenue,
New York 18, N. Y.

Re: Lewis Bellin

Dear Mr. Kaufman:

In the light of your remarks at the hearing before Judge Ryan, I have reviewed your correspondence with Mr. Adams and Mr. Finkelstein of ASCAP with respect to your request for information on behalf of Mr. Lewis Bellin.

On September 24, 1959, Mr. Finkelstein wrote to you repeating the offer of an unlimited right to examine the records relating to Mr. Bellin's performances, and stating that it would be necessary for you to designate the order in which you wish to make the inspection with respect to his compositions. Mr. Finkelstein suggested that you list the compositions in question for the pertinent period of time or that you set forth some other criterion which will enable you to find the information you seek and which will not unduly upset the operations of the program department.

Mr. Finkelstein also stated that with respect to matters other than Mr. Bellin's performances, you would have to give more information as to what you were seeking.

It seems to me that if you will follow the reasonable procedures suggested by Mr. Finkelstein, you will be able to get the proper information.

Very truly yours,

Arthur H. Dean

[fol. 763]

EXHIBIT 15 TO AFFIDAVITS

SULLIVAN & CROMWELL

48 WALL STREET

NEW YORK 5

CABLE ADDRESS "LADYCOURT"

October 27, 1959

C
O
P
Y

Mr. Guy Friedman,
Templeton Publishing Co., Inc.,
157 West 57th Street,
New York 19, N. Y.

Dear Mr. Friedman:

ASCAP has referred to me your letter of October 21, 1959 to Mrs. Kissel, in which you inquire concerning the song entitled "BE SOCIABLE".

In the normal course of events, the Society holds in abeyance performance credits for jingles until any advertising agency agreements concerning the works are submitted showing the disposition of performing rights. The performance credits for "BE SOCIABLE" are being held in abeyance because a copy of any such agreement concerning "BE SOCIABLE" has not been sent to ASCAP.

I understand that both you and Mr. Henry Sylvan are aware of the need for submitting evidence as to the retention or disposition of performing rights before credits for a jingle can be compensated. I suggest that you forward this information to ASCAP.

Very truly yours,

Arthur H. Dean

[fol. 766]

EXHIBIT 18 TO AFFIDAVITS

SULLIVAN & CROMWELL

48 WALL STREET

NEW YORK 5

CABLE ADDRESS "LADYCOURT"

November 6, 1959

C
O
P
Y

Mr. Guy Freedman,
Templeton Publishing Co., Inc.,
157 West 57th Street,
New York 19, N. Y.

Dear Mr. Freedman:

This will acknowledge your letters of November 2 and November 3, 1959, with respect to Mr. Sylvern's Pepsi Cola jingle "BE SOCIABLE", as well as the copy of the contract with Kenyon & Eckhard.

The agreement discloses that "BE SOCIABLE" is used as a jingle under direct license from Mr. Sylvern, presumably in accordance with the rights preserved to members of ASCAP under Article III, Section 6 of the Society's Articles of Association. Thus, it appears that no license from the Society is necessary for the performance of this jingle by Pepsi Cola. Under the circumstances, ASCAP would make no payments to Mr. Sylvern for use of the jingle by Pepsi Cola although I am advised by ASCAP that appropriate credits will be given for any use of the work which appears in the Society's survey, other than as the Pepsi Cola jingle.

I regret the delay resulting from the fact that the staff of the Society has been waiting for a copy of the agreement which you have now supplied. They should, of course, have written you requesting it at once.

Sincerely yours,

Arthur H. Dean.

[fol. 767]

EXHIBIT 19 TO AFFIDAVITS

SULLIVAN & CROMWELL

48 WALL STREET

NEW YORK 5

CABLE ADDRESS "LADYCOURT"

November 4, 1959.

C

O

P

Y

Mr. Edgar William Battle,
560 West 149th Street,
New York 31, N. Y.

Dear Mr. Battle:

After hearing your remarks to Judge Ryan on October 20, 1959, I inquired about performance credits for the song entitled "TOPSY" and the payment for those credits.

The ASCAP records indicate the publisher of "TOPSY" to be Cosmopolitan Music Publishers. The substantially increased number of performances for "TOPSY" in the quarter year October 1, 1958 through December 31, 1958 was reflected in the July 1959 distribution to Cosmopolitan Music Publishers, and will be reflected to you as a writer in the October 1960 distribution. The publisher total of performance credits for this period, for radio and television was 19,483.63.

For the period from January 1, 1959 through March 31, 1959, Cosmopolitan Music Publishers has already received distribution in October 1959 for 951.71 television credits, and it has or will shortly hereafter receive distribution for the radio credits during that period. Your writer credits for this period will also be reflected in your October 1960 distribution.

The reason for the delay in the publishers' distribution for the radio credits for the period January 1 through March 31, 1959, was occasioned by mechanical failure experienced by The Service Bureau Corporation, a sub-

sidiary of International Business Machines. In processing the publishers' statements for this period; their automatic machines failed to print radio performance credits for compositions whose titles commenced with the letters "T" to "Z". When this difficulty was discovered, The Service Bureau Corporation reprocessed all of the publisher radio credits, and all corrections have now been made.

Very truly yours,
Arthur H. Dean.

[fol. 770]

EXHIBIT 22 TO AFFIDAVITS

CABLE ADDRESS — SAMFOX NEWYORK

SAM FOX PUBLISHING COMPANY

INCORPORATED

MUSIC [Emblem] PUBLISHERS

RCA BUILDING • RADIO CITY • NEW YORK, N. Y.

• CHICAGO • HOLLYWOOD

New Address

THIS LETTER FROM
NEW YORK OFFICE
11 WEST 60TH STREET
NEW YORK 23, N. Y.

PHONE: CIRCLE 7-3890

HERBERT CHEYETTE
RESIDENT COUNSEL

November 4, 1959

Mr. Howard T. Milman
Sullivan & Cromwell
48 Wall Street
New York 5, N.Y.

Dear Mr. Milman:

In accordance with our conversation of last week, I am hereby formally notifying you that the following speakers

wish to speak against the adoption of the Proposed Modification of the 1950 Consent Decree at the West Coast meeting on November 11, on behalf of those members who were represented by counsel at the Hearing before Judge Ryan, who now wish to oppose the adoption of the proposed modification.

Mr. Frederick Fox

Mr. Hans Lengsfelder

One writer whose name will be given to Mr. Adams before the West Coast meeting.

It is our understanding that these members will be permitted to speak before the meeting is thrown open to the general membership. It can hardly be open to dispute that the fairest presentation of the alternatives involved requires alternate presentations by "proponents" and "opponents" of the Decree.

A similar letter will be sent to you with respect to the speakers for the East Coast meeting.

Sincerely yours,

/s/ HERBERT CHEYETTE
Herbert Cheyette

HC:am

[fol. 771]

EXHIBIT 23 TO AFFIDAVITS

SULLIVAN & CROMWELL
48 WALL STREET
NEW YORK 5

CABLE ADDRESS "LADYCOURT"

C

O

P

Y

November 6, 1959

Herbert Cheyette, Esq.,
Sam Fox Publishing Company,
11 West 60th Street,
New York 23, N. Y.

Dear Mr. Cheyette:

This will acknowledge your letter of November 4, 1959, advising that Mr. Frederick Fox and Mr. Hans Lengsfelder wish to speak against the proposed Consent Order at the West Coast meeting on November 11th, and that you will notify Mr. Adams of the name of another writer who also wishes to speak against the proposed Consent Order.

I also note that these members wish to speak before the meeting is thrown open to the general membership.

I shall forward a copy of your letter to Mr. Adams who, as President of the Society, will preside at the meeting.

You can feel assured that the meeting will be conducted in the spirit of the suggestions of Judge Ryan, and that the members to whom you refer will be given a fair opportunity to speak.

The fair and orderly conduct of the meeting is and must be the responsibility of Mr. Adams as President and we have no authority to restrict his discretion as Presiding Officer. It would be inappropriate for him to agree in advance that the three members to whom you refer will be permitted to speak before any of the other members, or that these three members and three selected "proponents" will be permitted to speak alternately before any of the other members. Mr. Adams' discretion in recognizing speakers cannot be circumscribed and we want to be very

clear that we have no understanding as to how the meeting will be conducted.

However, consideration will certainly be given to the fact that Mr. Fox and Mr. Lengsfelder were represented by counsel at the hearing before Judge Ryan and that you have [fol. 771a] given advance notice that they, and an as yet unnamed writer member, wish to speak at the earliest opportunity.

Sincerely yours,
Howard T. Milman.

[fol. 772]

EXHIBIT 24 TO AFFIDAVITS
COVINGTON & BURLING
UNION TRUST BUILDING

EDWARD B. BURLING
JOHN LORD O'BRIAN
DEAN G. ACHESON
NEWELL W. ELLISON
JOHN G. LAYLIN
H. THOMAS AUSTERN
FONTAINE C. BRADLEY
ALAN C. MAXWELL
HOWARD C. WESTWOOD
EDWARD BURLING, JR.
CHARLES A. HORSKY
GERHARD A. GESELL
JOEL BARLOW
HUGH B. COX
DONALD HISS
W. GRAHAM CLAYTOR, JR.

J. HARRY COVINGTON
JOHN T. SAPIENZA
W. CROSBY ROPER, JR.
NESTOR S. FOLEY
JAMES H. MC GLOTHLIN
DANIEL M. GRIBBON
ERNEST W. JENNES
HARRY L. SHNIDERMAN
EDWIN MC ELWAIN
STANLEY L. TEMKO
DON V. HARRIS, JR.
PAUL C. WARNKE
JAMES C. MC KAY
WILLIAM STANLEY, JR.
JOHN W. DOUGLAS
DAVID C. ACHESON

WASHINGTON 5, D. C.

October 22, 1959

Herman Finkelstein, Esq.,
American Society of Composers,
Authors and Publishers
575 Madison Avenue
New York, New York

Dear Mr. Finkelstein:

As I mentioned to you at the conclusion of the hearing before Judge Ryan, I should like very much to be present

at the time the ballots in the elections directed by Judge Ryan are opened. You asked at the time that I spoke to you that I put this request in writing so that it would not be overlooked.

I would also like to call your attention to the necessity for establishing some procedure for the submission to the membership of statements by the ASCAP Board of Directors and by the ASCAP members who appeared at the hearing in opposition to the proposed further amended consent final judgment. I hope you will be considering this question so that we may talk about it shortly.

Very truly yours,

/s/ C. A. HORSKY

[fol. 774]

EXHIBIT 26 TO AFFIDAVITS

SCHAEFFER & SCHAEFFER

ATTORNEYS AT LAW

54 WEST RANDOLPH STREET

CHICAGO 1

TELEPHONE, STATE 2-1225

MORTON SCHAEFFER
LIBBY G. SCHAEFFER

October
28
1959

Herman Finkelstein, Esq.

American Society of Composers, Authors & Publishers
575 Madison Avenue
New York 22, N. Y.

Dear Herman:

Pursuant to our conversation, enclosed herewith please find copy of the report which I have submitted to my clients.

Sincerely,

MS:S
enc.

/s/ MORTON
Morton Schaeffer

[fol. 774a]

SCHAEFFER & SCHAEFFER

ATTORNEYS AT LAW

54 WEST RANDOLPH STREET

CHICAGO 1

TELEPHONE STATE 2-1225

MORTON SCHAEFFER

LIBBY G. SCHAEFFER

October 23, 1959.

REPORT

To: Publishers represented

From: Morton Schaeffer

Subject: Future Logging of ABC Radio Network

When I was first retained to represent 15 music publishers, members of the American Society of Composers, Authors and Publishers, on or about September 18, 1959, I immediately attempted to contact ASCAP for an explanation of the statement made by Arthur Dean, Special Counsel for ASCAP, that the ABC Radio Network was not included in the radio networks to be logged, but covered by a scientific sampling as recommended by Joel Dean Associates, economic and management consultants.

In the absence of any reply from ASCAP, I telephoned the Department of Justice in Washington and contacted Mr. Alfred Karsted, one of the attorneys who worked on the proposed amendments to the consent decree on behalf of the government. The government through Mr. Karsted, then submitted to me its memorandum in support of the proposed amendments. I also obtained a transcript of the hearings before the Small Business Committee, and its report on ASCAP policies.

When ASCAP on October 5, 1959 mailed to its members a memorandum with respect to the new survey put into effect on October 1, 1959, I submitted it to the Justice Department and received a reply from Robert A. Bicks, Acting Assistant Attorney General, Anti-Trust Division, which stated as follows:

"We are informed that the ABC Radio Network now has but one musical program, that the network pays ASCAP a license fee smaller than that of many individual stations and that the license fee paid by the network would not warrant the expense of taking a complete census of the ABC musical program.

"If the facts are as stated, it would seem unreasonable to require a complete census of the ABC Network and the proposed Order leaves ASCAP with some discretion in the matter, for Section II of the proposed order requires ASCAP to conduct or have conducted 'a census and/or a scientific sample'."

On October 15th, I met with Messrs. William Kilgore and Alfred Karsted in the office of the Anti-Trust Division [fol. 774b] of the Department of Justice in Washington, D. C. to determine what steps, if any, could be taken to ascertain the basis or to obtain figures to substantiate this alleged difference between the fees received by ASCAP from ABC, NBC and CBS Radio Networks.

The Justice Department would make no disclosure as to these amounts.

I also contacted the office of the Honorable James Roosevelt, Chairman of Sub-Committee No. 5 of the House Small Business Committee, and received from them a staff analysis, prepared by B. H. Jacques of the proposed amendments to the ASCAP consent decree which was dated October 9, 1959. This analysis had not been submitted to the members of the Sub-Committee, and was not considered an official report of the Committee. However, it was in the hands of the Anti-Trust Division of the Department of Justice on October 15, 1959. This staff Analysis states as follows with respect to the *Performance Survey and Logging System*:

"The principal function served by the Society is to develop information disclosing the circumstances under which a member's songs have been used. It would have been reasonable to assume, therefore, that the Society would enable itself to carry out this mission in a professional, scientific and expert manner. Ac-

ually, however, the hearings of the House Small Business Committee disclose that the methods used by the Society to discover such information were surprisingly inept and inadequate. The 1950 decree required the Society to conduct objective surveys but there appears to have been a failure to do so.

"Antitrust attorneys took cognizance of this situation and have caused the proposed decree to contain provisions that would bring about marked improvement in this important area of the Society's work. These provisions would seem to require the Society to conduct its samplings and surveys in accordance with recognized principles used by other organizations performing similar functions.

"Some method must be found to reduce the quantity of unidentified tunes. Paragraph II (A) of the Order states that ASCAP in certain cases shall endeavor to obtain logs of performances to reduce nonidentifications, but this requirement is weakened and perhaps nullified by permitting it to be done 'as the surveying organization deems necessary'.

"It is noted that the Antitrust Division has reserved the right to ask the court at a later date to require changes or improvements in the survey procedures. Accordingly, further improvements should be required if found desirable."

fol. 774c] I also conferred with Messrs. Richard O'Donnell, John L. Wilson and Walter Bennett in the New York Office of the Anti-Trust Division of the Department of Justice on October 16, who confirmed my opinion that the Justice Department felt that the proposed changes would be an improvement of the present internal workings of SCAP.

Finally I was able to confer with Mr. Herman Finkelstein, general counsel for ASCAP, and obtained from him an agreement to continue taking the logs prepared by the NBC Radio Network and using them for the purpose of assuring identification of all musical compositions taped

from the ABC Radio Network under the scientific sample, subject to the approval of ASCAP's special counsel.

I was present at the hearings before Judge Sylvester Ryan on October 19th and 20th.

The agreement I obtained was confirmed by the statement of Mr. Arthur Dean in open Court and made part of the record that the Society would continue to accept for identification purposes the logs of ABC Radio Network.

This means that every musical number of whatever nature used on the Breakfast Club will be identified in the survey.

Most of the attorneys who appeared before the Court on behalf of ASCAP writers and publishers were in disagreement as to what the ultimate results would be from the proposed amendments.

It seemed to be the consensus of opinion that there would be some improvement, but as to how much no one would even venture a guess.

My argument to the court was that there had been no disclosure to the publishers as to the basis of income from the radio networks so as to enable them to appraise the decision of ASCAP to drop ABC radio from net work logging. I was informed by the Court that the contracts of ASCAP with the Broadcasters specifically provide that such figures would not be publicly disclosed.

It is my belief that the Department of Justice is not wholly unaware of the internal workings of ASCAP. The proposed amendments which have been reached by way of compromise between the government and ASCAP, give recognition to many of the inequities and attempt to correct them.

It is true that this instrument does not claim perfection, but then it is impossible to find a formula which would satisfy every member of ASCAP. I do not believe that protracted litigation would be of benefit. It stands to reason that such litigation with its attendant expenses can only result in a reduction of income to all members. [fol. 774d] The Court in its comments indicated if the proposed amendments to the consent decree are not approved by the members of ASCAP, then the government

could bring ASCAP to trial on the entire matter with the possibility that a dissolution thereof would be ordered. This, of course, sounds extreme, but it is within the realm of possibility.

There is also the possibility if the proposed amendment to the consent decree is not approved by the membership, that the matter will go back to the Justice Department for the purpose of revision and to give effect to the objections voiced by some of the members.

The proposed amendments will be referred to the ASCAP membership for approval or disapproval. This vote will be reported to the Court, and hearing has been set for January 6, 1960.

Respectfully submitted,

/s/ MORTON SCHAEFFER
Morton Schaeffer

[fol. 777]

EXHIBIT 29 TO AFFIDAVITS

C
O
P
Y

December 29, 1959

Herbert Cheyette, Esq.
Sam Fox Publishing Company, Incorporated
11 West 60th Street
New York 23, New York

Dear Mr. Cheyette:

This will confirm that, in accordance with your request, the minutes of the special membership meeting of the Society held November 24, 1959, will be made available for your inspection at 10:30 a.m., tomorrow, at this office.

Sincerely yours,

Herman Finkelstein

cc: Arthur H. Dean, Esq.

[fol. 779]

EXHIBIT 31 TO AFFIDAVITS

CABLE ADDRESS
"DROCIR" NEW YORK

TELEPHONE
JUDSON 2 3300

[Emblem]

G. RICORDI & CO.

[Emblem]

INCORPORATED
MUSIC PUBLISHERS
16 WEST 61ST STREET
NEW YORK 23, N. Y.

ESTABLISHED 1808 IN MILAN
BRANCHES

—
ROME
NAPLES
PALERMO
GENOA
LONDON
PARIS
BRUSSELS
LEIPZIG
LORRACH
FREIBURG
BASEL
TORONTO
MEXICO CITY
SAO PAULO
BUENOS AIRES
SYDNEY

GUIDO VALCARENGHI
CHAIRMAN OF THE BOARD
FRANCO COLOMBO
PRESIDENT
EUGENIO CLAUSETTI
SECRETARY AND TREASURER

October 9, 1959

Mr. Stanley Adams, President
American Society of Composers
Authors and Publishers
575 Madison Avenue
New York 22, N. Y.

Dear Mr. Adams:

On Wednesday, September 23, 1959, at the invitation of
Mr. Irving Broude, a certain number of publishers, mem-

bers of A. S. C. A. P., mainly devoted to the publishing of so-called "serious" music, held a meeting on A. S. C. A. P.'s premises for the purpose of commenting on the various documents distributed by A. S. C. A. P. to the entire membership, namely: an Order by Judge Sylvester J. Ryan, dated June 29, 1959, with several annexes; a Memorandum, dated July 21, 1959, of Sullivan & Croinwell; the "Remarks of Mr. Arthur H. Dean at the New York Meeting of A. S. C. A. P. on August 27th, 1959"; and the Memorandum of the Department of Justice, dated September 2, 1959; all such documents herein cumulatively referred to as the "New Consent Decree".

The gathering was informal and had mainly an exploratory purpose. It was, nevertheless, attended by two members of the A. S. C. A. P. Board of Directors, Mr. Frank Connor and Mr. Adolph Vogel and, at least for part of it, by yourself, Mr. Richard Murray and Mr. Herman Finkelstein.

[fol. 779a] The meeting mainly discussed the impact that the "New Consent Decree" may have on the survey of the use of "serious" music by various organizations dealing with A. S. C. A. P. and on the distribution of the monies such organizations pay annually to A. S. C. A. P. under a blanket license.

The meeting felt the need to have the "New Consent Decree" closely examined and for this purpose appointed a Committee composed of the following:

- Mr. David Adams, of Boosey & Hawkes
- Mr. Irving Broude, of Broude Brothers
- Mr. Salvatore Chiantia, of Leeds Music Corp.
- Mr. Franco Colombo, of G. Ricordi & Co.
- Mr. Arthur Hauser, of Theodore Presser Co.
- Mr. Hans Heinsheimer, of G. Schirmer, Inc.

This Committee, upon having examined the "New Consent Decree", was to report to all publisher members having a particular interest in the publication of "serious" music and submit its findings and its eventual recommendations for action. The two above-mentioned Board Members agreed to offer the Committee their assistance and A. S.

C. A. P. counsel, subject to the final decision of the A. S. C. A. P. Board of Directors, agreed in principle to make himself available to the Committee if necessary.

The Committee subsequently met three times, at the Office of G. Schirmer: on Friday, September 25, on Wednesday, September 30, and on Monday, October 5. At the conclusion of their work, the members of the Committee have prepared the attached Memorandum.

The Committee has asked me to submit such Memorandum to you for distribution to all A. S. C. A. P. publishers and composers principally interested in the writing and the publication of serious music and has, furthermore, charged me to convey to you their unanimous wish that a meeting of said publishers and composers be called by A. S. C. A. P. for the purpose of discussing, and eventually ratifying, [fol. 779b] the Committee's suggestions and elect the Committee referred to in the attached Memorandum.

With kind regards, I remain

Very sincerely yours,

FOR THE COMMITTEE

/s/ FRANCO COLOMBO
Franco Colombo

FC/nv

cc. Mr. Frank Connor
Mr. Rudolph Tauhert
Mr. Adolph Vogel
Mr. David Adams
Mr. Irving Broude
Mr. Salvatore Chiantia
Mr. Arthur Hauser
Mr. Hans Heinsheimer

[fol. 779c]

MEMORANDUM

The Committee, after careful consideration of the entire "New Consent Decree", has focused its attention on four points:

1) The "New Consent Decree" does not seem to take into sufficient consideration, in so far as the local radio survey is concerned, that "serious" music is mainly performed by Stations producing the lowest revenue to A. S. C. A. P. It is therefore feared that under the strict application of the advocated survey system, "serious" music shall continue to receive only a nominal compensation.

While the Committee and all publishers of "serious" music are fully aware of the relatively small economic exploitation such music lends itself to, they nevertheless are firm in their belief that such music is of utmost importance to A. S. C. A. P. because of its cultural value, both on the national and international scene, and because, through the granting at almost no fee of the license to perform said music to hundreds of stations located in every State of the [fol. 779d] Union, A. S. C. A. P. performs an invaluable good-will gesture. The Committee therefore feels that to confine the compensation of those who are instrumental in the creating and, at a considerable expense, publishing this music, to the bare mathematical earnings which are to be expected from the mechanical application of the advocated survey system, would constitute discrimination against the composers and publishers of "serious" music.

On the other hand, having been assured by the Management of A. S. C. A. P. that the survey will regularly include the complete logging of all programs played by at least three, and possibly four, so-called "good music stations", and having furthermore ascertained that in all quarters of the A. S. C. A. P. Directorship and Management the above-mentioned cultural and good-will values of "serious" music are fully appreciated, and, finally, in view of the fact that the potential results of the "New Consent Decree" survey system are absolutely unforeseeable and shall not be properly evaluated until such time when the plan has been actually placed into operation,

[fol. 779e] THE COMMITTEE SUGGEST THAT:

no action be taken at present in order to modify the planned survey system, but that at the proper moment the pub-

lishers of "serious" music avail themselves—should it be the case—of the provision of the "New Consent Decree" concerning the "Review of Survey".

2) The "New Consent Decree" limits the logging of foreign Societies, which pay in excess of \$200,000 yearly to A. S. C. A. P. Composers of serious music attach paramount importance to the dissemination of their works throughout the entire world. Only thus may they hope to reach a large segment of the restricted public their music has and therefore achieve a position of prestige and the consequent financial security. To this purpose the publisher must go to great effort and expense so as to promote performances of "serious" works throughout the world. It becomes therefore of great economic importance that as many as possible of these performances yield to the publisher his rightful revenue.

Consequently the Committee believes that the logs of a large number of foreign Societies should be scanned by A. S. C. A. P. for the purpose of accurately logging performances of at least important "serious" musical works, easily recognizeable either from their titles and/or from the names of their composers or publishers. After having [fol. 779f] been assured by the A. S. C. A. P. Management that under the "New Consent Decree" the foreign Societies' statements to be logged shall include, besides Canada, Great Britain and Sweden, also the statements of the German, French and Italian Societies,

THE COMMITTEE PROPOSES THAT:

the publishers of "serious" music consider as sufficiently representative the survey of foreign revenue, as established by the "New Consent Decree", and accept that all foreign revenue be distributed on the basis of such survey.

3) The Committee interprets the listing of works under letter "D" of the "Weighing Formula" as being specific and in such case finds it incomplete.

THE COMMITTEE PROPOSES THAT:

after the words: "... (including chamber music)" the following words be added: "for the opera and the ballet"; [fol. 779g] and that until such change can be put into effect, opera and ballet should be deemed as included among the works mentioned in Paragraph "D" of the "Weighing Formula".

4) The point which has most seriously concerned the Committee has been constituted by the criteria set forth in Paragraph "C" of the "Weighing Formula" for the qualification of a musical composition as "qualifying work" for the purpose of establishing their compensation for their use as themes, background music, cue and bridge music.

The requirements for a "qualifying work", as stated in the "New Consent Decree" (letter "C", sub-paragraphs "i" and "ii"), can very rarely be met by a "serious" musical work. The Committee therefore fears that the result of the application of the Formula shall be discriminatory against "serious" music.

THE COMMITTEE SUGGEST THAT:

a different criterion be used in order to qualify as "qualifying works", "serious works" as defined under letter "D" [fol. 779h] of the "Weighing Formula". Such criterion to be based on the fact the work has:

a) obtained a certain number of feature performances on radio, television or in concerts;

and

b) been recorded commercially on records of the "Red Label" type or on tapes—either in the United States or abroad;

or

c) been published in its original form in its entirety.

.....

In view of the fact that the "New Consent Decree", at least in so far as it can humanly be foreseen at this date, shall greatly modify the present distribution system and that it is therefore very difficult to formulate any recommendation to modify the "New Consent Decree", for the purpose of giving to "serious" music publishers and composers a fair and equitable compensation for the use of their properties and creations, with the certainty that such suggestions really constitute an improvement on what the "New Consent Decree" presently provides and in view [fol. 779i] of the cooperative attitude of A. S. C. A. P.,

THE COMMITTEE SUGGEST THAT:

the publishers of "serious" music do not enter a claim in front of Judge Ryan in order to seek modifications to the "New Consent Decree" but do instead, together with the composers of "serious" music, appoint an Advisory Committee, possibly formed by four publishers and four composers, to rotate every year and not to serve for more than two consecutive years, to collaborate with the Board of Directors and the Management of A. S. C. A. P. for the purpose of:

- examining the results of the application of the "New Consent Decree";
- keeping all publishers and composers of "serious" music constantly informed of their findings;
- accepting and conveying to the Board of Directors and Management of A. S. C. A. P. all suggestions and complaints which the Committee shall deem well-founded and interesting the totality of the composers and publishers of "serious" music;
- [fol. 779j] —proposing to the Board of Directors modifications or corrections of the survey system;
- preparing in simplified and exemplified form, a set of rules concerning the survey system of "serious" music, the distribution of Royalties, etc., under the "New Consent Decree" system.

It is in fact this Committee's firm belief that acknowledgment of the specific problems facing American composers and publishers of "serious" music, while not clearly defined and solved in the "New Consent Decree", were nevertheless present when it was drafted.

This is not only apparent from the wording of several provisions thereof, but has been also confirmed to Members of this Committee by the A. S. C. A. P. Management.

IT IS THEREFORE EXPECTED THAT:

—also on the part of the Department of Justice recognition and consideration of said problems shall be granted, even after the "New Consent Decree" has become operative;

[fol. 779k] —suggestions or claims which "serious" music publishers and composers may advance in order to translate the cultural values of their products into economic realities, essential for their very survival, shall be the object of careful and sympathetic attention from all quarters;

—the proposed Advisory Committee shall be the best and most authoritative instrument to formulate and properly submit such suggestions.

FOR THE COMMITTEE

/s/ FRANCO COLOMBO
Franco Colombo

New York, October 9, 1959.

[fol. 791]

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
Civ. 13-95

UNITED STATES OF AMERICA, Plaintiff,
vs.

AMERICAN SOCIETY OF COMPOSERS, AUTHORS AND
PUBLISHERS, et al., Defendants.

Before: Hon. Sylvester J. Ryan, District Judge.

**Transcript of Proceedings of January 6, 1960
and January 7, 1960.**

[fol. 792] COLLOQUY BETWEEN COURT, COUNSEL
AND PERSONS DELEGATED TO CANVASS BALLOTS

The Court: We are convened this morning for the purpose of canvassing in open court the ballots which were cast pursuant to the order that the Court made, directing that a ballot be taken on a proposed amended decree.

Mr. Dean, would you state for the record just what has been done in connection with the taking of this ballot, so that we might have on the record exactly what has been done.

Mr. Dean: Yes, your Honor. As your Honor will recall, when we recessed on October 20th, the hearings in this matter, so that members of ASCAP could vote on a proposed consent order that further amended the 1950 ASCAP consent decree and judgment, and on the proposed amendments to ASCAP's Articles of Association, which are required by the said proposed amendment to the consent decree, your Honor at that time designated Mr. Herman Finkelstein, who is in court this morning, the general attorney for ASCAP, giving him the responsibility of supervising the balloting and renting a post office box and receiving the ballots.

On November 27, 1959 your Honor entered an order designating Jerome I. Golinko & Company, independent Certified Public Accountants, to assist Mr. Finkelstein in connection [fol. 793] with the vote of the members, and attached to that order, as Annex A, were the procedures to be followed in verifying the number of votes to which each member was entitled, and the procedures for mailing the ballots, receiving the ballots, and tabulating the ballots today in open court.

I would like to inform your Honor that the procedures provided in that order of November 27, 1959 have been followed exactly. There was filed in court on December 17, 1959 a set of affidavits, describing what was actually done in connection with the preparation, checking and mailing of the ballots; and attached to that set of affidavits are the documents sent to the members, which include the following:

(1) A covering letter dated November 29, 1959, signed by Mr. Stanley Adams, President of ASCAP, explaining the vote to be taken;

(2) A ballot on which the members of ASCAP could vote "Yes" in favor of approving the amendment to the proposed consent order and to adopt the amendments to the Articles of Association, or to vote "No", that is to say, against approving the amendments to the proposed consent judgment and against adoption of the amendments to [fol. 794] the Articles of Association. Each ballot also had on it the number of votes to which the member is entitled under the weighted vote provisions of the existing Articles of Association of ASCAP;

(3) A copy of the proposed consent order, as well as copies of the proposed Writers Distribution Formula and Proposed Weighting Formula; and

(4) A copy of the Proposed Amendments to the Society's Articles of Association.

Pursuant to your Honor's order of November 27, 1959, the voting lists of ASCAP were closed at the end of the day on November 24, 1959, and the ballots were mailed by Jerome I. Golinko & Company on November 29, 1959.

Prior to that time, Jerome I. Golinko & Company had received the ballots and the envelopes in which they were mailed, as provided in your Honor's order of November 27, 1959.

I would like to request that the affidavits to that effect, of Mr. Herman Finkelstein, Mr. Aaron A. Mappen of Jerome I. Golinko & Company, and Mr. Robert Turner, each verified the 15th day of December 1959, and heretofore filed by the Court as a single document, be deemed [fol. 795] marked as Exhibit A.

The Court: Will you mark them Exhibit A.

(Marked Court's Exhibit A.)

The Court: Those affidavits were filed with me, and I in turn sent them to the Clerk's office after examining them.

I am satisfied from a reading of them that the provisions of my order were complied with.

Mr. Dean: On November 17, 1959, Mr. Finkelstein rented a post office box, No. 2578, at the Grand Central Station Post Office, and he turned the receipt for the box over to Mr. Mappen of Jerome I. Golinko & Company, on November 23, 1959, six days before the mailing. Mail could not be removed from this post office box without this receipt.

Each day Mr. Mappen removed all of the ballots received at the post office box prior to midnight on December 19, 1959. He thereafter removed and segregated any ballots received after that date. Ballots postmarked on or before December 19, 1959 and received thereafter have also been segregated and listed and are here in open court. Some ballots were delivered to the offices of ASCAP or to Mr. Finkelstein directly, and these ballots were daily turned [fol. 796] over unopened to Mr. Mappen on or before December 19, 1959.

The detailed method in which Mr. Finkelstein and Mr. Mappen complied with the receiving procedures set forth in the order of the Court of November 27, 1959 are set forth in the affidavits of Mr. Finkelstein and Mr. Mappen, verified January 5, 1960.

I would like to ask that these affidavits which are bound together with exhibits, be marked as Exhibit B.

The Court: They will be so marked.

(Marked Court's Exhibit B.)

The Court: These affidavits I haven't examined yet. I will do so during the morning.

Mr. Dean: I think I handed you my copy as well as yours.

The Court: Yes, you handed me a copy.

I think if you do have copies, Mr. Dean, available, while the ballots are being canvassed later on, you may make them available to anybody who has an interest in them. Any member of the Bar who is here, who has an interest in looking at them, I would like you to make it available to them.

[fol. 797] Mr. Dean: We will be very happy to do that.

The Court: All right.

Mr. Dean: As ordered by the Court, the sealed and unopened ballots are present in open court today, and these ballots have been in the custody of Jerome I. Golinko & Company continuously since they have been received and the ballots have been sorted for ease of tabulation. The ballots, however, remain sealed, so that up to this moment no one knows how the ballots are marked.

Mr. Mappen has prepared a memorandum, outlining the procedures to be followed in the tabulation of the votes today, which I would like to read into the record, and I would then like to have this memorandum marked as Exhibit C.

The Court: Suppose we mark it as Exhibit C now, and suppose you read it slowly into the record so that all those present may be advised as to the procedure which the Court intends to follow, because Mr. Mappen has prepared this schedule of proceedings after consultation with me.

Mr. Dean: This is on the letterhead of Jerome I. Golinko & Company.

The Court: Suppose we mark it first as an exhibit, if you will.

[fol. 798] (Marked Court's Exhibit C.)

The Court: Take your time, and if you don't mind, read it slowly so that everybody can hear it. It is more important

that those present in the courtroom hear it than I, because I know what is in there already.

Mr. Dean: I am reading from Exhibit C, on the letter-head of Jerome I. Golinko & Company, Certified Public Accountants, 1776 Broadway, New York.

It is headed:

"MEMORANDUM OF PROPOSED TABULATING PROCEDURE
TO BE FOLLOWED IN COURT ON JANUARY 6, 1960, IN
CONNECTION WITH THE ASCAP BALLOTING"

"1. The procedures outlined herein will be executed by the following partners and/or employees of our firm:

"Reinhold Dreher"—

The Court: Reinhold Dreher.

(Mr. Dreher stands.)

Mr. Dean: (Reading)

"Aaron A. Mappen."

[fol. 799] The Court: Mr. Mappen is over here.

I think I should interrupt you and state that I personally selected this firm to function in connection with the taking of this ballot, and I did so because of the services they had rendered me in other litigations, they and their deceased partner, Jerome I. Golinko. I found them to be thoroughly trustworthy, reliable and eminently competent, and they have the complete confidence and trust of the Court. They are functioning as officers of the Court.

Do you understand that, Mr. Dreher?

Mr. Dreher: Yes, your Honor.

The Court: And you do, too, Mr. Mappen?

Mr. Mappen: Yes, sir.

The Court: You both are functioning as officers of the Court here, assisting the Court in the canvassing of this balloting, and your assistants and associates are likewise functioning as officers of the Court, and I place in each and every one of you my utmost confidence and trust. I know that it will not be betrayed and I know that you will carry

out this trust faithfully, as you have carried out trusts imposed on you in the past. I want you to know that you [fol. 800] have not only the confidence and trust of the Court, but I expect that this will be an impartial canvassing, and I want it that way, and I have made that very plain to you from the very beginning.

All right.

Mr. Dean: "Paul J. Wendell."

The Court: He is one of the canvassers, is he?

Stand up, Mr. Wendell.

(Mr. Wendell stands.)

The Court: If you folks will stand up as your name is called, we will appreciate it.

Mr. Dean: "Abraham Leitner."

(Mr. Leitner stands.)

Mr. Dean: "Paul I. Krohn."

(Mr. Krohn stands.)

Mr. Dean: "Marie V. R. Pugliese."

(Miss Pugliese stands.)

Mr. Dean: "Jerome E. Turkel."

(Mr. Turkel stands.)

Mr. Dean: "Edward I. Rubinstein."

(Mr. Rubinstein stands.)

Mr. Dean: "Jerome Goldberg."

(Mr. Goldberg stands.)

[fol. 801] Mr. Dean: "Julian M. Weiss."

(Mr. Weiss stands.)

Mr. Dean: "Lillian Rodriguez."

(Miss Rodriguez stands.)

The Court: Now you ladies and gentlemen are to function as Mr. Dreher and Mr. Mappen in the canvassing of these votes.

You have heard what I said to your employers, and that applies to you. Each and every one of you are functioning as officers of the Court here, and I place great trust and confidence in you. I want this to be a fair, a just, and an accurate canvass.

Mr. Dean: (Reading)

"2. The ballots will be brought to court unopened and have been segregated by classes as follows:

"Writer members:

- "(a) Non-participating members
- "(b) Participating members with one vote
- "(c) Participating members with 2 to 5 votes
- "(d) Participating members with 6 to 25 votes
- "(e) Participating members with 26 to 50 votes
- "(f) Participating members with 51 to 100 votes
- "(g) Participating members with 101 to 250 votes
- "(h) Participating members with over 250 votes

[fol. 802] "Publisher members:

- "(aa) With one vote
- "(bb) With 2 to 3 votes
- "(cc) With 4 to 5 votes
- "(dd) With 6 to 10 votes
- "(ee) With 11 to 20 votes
- "(ff) With over 20 votes

"3. Tabs will be removed from the ballots and filed in envelopes provided for that purpose.

"4. The ballots will be slit open on the machines provided for that purpose"—

The Court: Can I interrupt?

Mr. Dreher, have you the ballots here?

Mr. Dreher: The ballots are all here, your Honor.

The Court: Are they segregated?

Mr. Dreher: They are all segregated right on these tables, all in view.

The Court: How are they segregated?

Mr. Dreher: They are segregated in accordance with your Honor's order. Those are publisher ballots.

The Court: All those on Mr. Mappen's table are publisher ballots?

Mr. Dreher: Yes, sir.

[fol. 803] The Court: Suppose you come over, and as you describe them, show us where they are, and I think you should state upon the record that Mr. Dreher, Mr. Mappen and the canvassers are in a roped-off inclosure in the courtroom. No one will be allowed to come into that roped-off inclosure except the Court and the court attaches during the canvassing of the ballots. The ballots will be canvassed in open court, where anybody can see what is being done by standing outside of the roped-off inclosure. But I don't want anybody to come into the inclosure except the canvassers and their principals, Mr. Dreher and Mr. Mappen, or officers of the court or myself; and the officers of the court and myself will not interfere in any way with the canvassing. This canvassing is to be done here in your presence, but without any interference of any kind.

All right. Will you just tell us.

Mr. Dreher: Your Honor, these are all the publisher ballots.

The Court: "These" indicating on the table over to my right the publisher ballots.

Do you know how many there are in number there? Have you numbered them yet?

[fol. 804] Mr. Mappen: Yes, we have.

Mr. Dreher: They have all been numbered, your Honor, for identification purposes, but we don't know exactly how many there are from this.

Let's see how many you have there, Aaron.

There are 1,101 publisher ballots.

The Court: 1,101 publisher ballots.

Now these ballots have little tags on them, annexed to an envelope, have they?

Mr. Dreher: Yes, they are little tabs and they are sealed.

The Court: The envelopes are sealed and the tags protrude beyond the sealed portion of the envelopes.

Mr. Dreher: That's right, and they are perforated.

The Court: What is the procedure you intend to follow with reference to these ballots?

Mr. Dreher: Our procedure will be this. We will remove the tabs and segregate them in another envelope. They are of no consequence from here on, except if we have to make a reference to a voting list.

The Court: All right. Now what is on the tabs?

[fol. 805] Mr. Dreher: On the tabs there is a ballot number, a space for the number of votes, in this case the name of the firm, and the signature of a representative of the firm.

The Court: Now you are going to detach these tabs.

Mr. Dreher: That's correct.

The Court: And you are going to put them in a separate envelope.

Mr. Dreher: That's correct.

The Court: And that is to be done with each batch of ballots?

Mr. Dreher: Right.

The Court: And the envelope in which the tabs are to be placed is to be sealed and marked so that it can be identified.

Mr. Dreher: That's correct, your Honor.

The Court: And then that envelope is to be kept here and be deposited here with the tabs, and when I say "here" I mean with the Court.

Mr. Dreher: With the Court.

The Court: Now then, that will leave you the envelopes, the sealed envelopes, without the tabs, in which the ballots are set forth.

[fol. 806] Mr. Dreher: Your Honor, these are not the sealed envelopes. These are the sealed ballots.

The Court: The sealed ballots.

Mr. Dreher: Right.

The Court: What are you going to do now with the ballots?

Mr. Dreher: We have here two postage-opening machines. We will bring the ballots to the postage-opening machines.

The Court: I don't like that "postage-opening machine". That might be—

Mr. Dreher: Letter-opening machine.

The Court: Letter-opening machine. I don't want any interference with the mails.

You will have two letter openers here, mechanical letter openers.

Mr. Dreher: That's right. We have letter openers from ASCAP, who know how to operate these machines and will run them under our supervision.

The Court: How many operators are you going to have on that?

Mr. Dreher: One on each machine.

The Court: Who are those two operators? Where are they?

[fol. 807] (Two men stood up in the courtroom.)

The Court: Come down here, gentlemen, you two, and we will put your names on the record.

You don't mind, Mr. Dean, my interrupting you?

Mr. Dean: Not a bit, your Honor.

The Court: I want to be satisfied and I want everybody here to know what is going on.

What is your name, young man?

Mr. Dabundo: Guy Dabundo, D-a-b-u-n-d-o.

The Court: Where do you live, Mr. Dabundo?

Mr. Dabundo: 44 Third Place, Brooklyn, New York.

The Court: And your name, sir?

Mr. Rosenberg: Edward Rosenberg.

The Court: Now you gentlemen better come over here and sit in those two chairs there. One will sit in a jury chair and the other one will sit over there, if you don't mind.

Now these two gentlemen are to simply—

Mr. Dreher: Operate the machines.

The Court: That will open the envelopes.

Mr. Dreher: That will slit the ballots open.

[fol. 808] The Court: All right. Then what are they to do then?

Mr. Dreher: Nothing more, sir.

The Court: Then I suggest that they proceed to open all these envelopes. You watch one of them; Mr. Mappen watch the other as he does it.

When I say "watch him", see that he does it mechanically right so as not to destroy or mutilate the ballots. Then you

take the ballots, each one of you, and when they have opened all of the ballots on these machines, they will then step out of the inclosure.

Do you understand what you are to do?

Mr. Dreher: Yes.

The Court: What is going to happen after you open this group of 1,100 publisher ballots? What is going to happen with those ballots first?

Mr. Dreher: They are going to go to Mr. Mappen and Miss Pugliese here, who as a team will count them and tabulate them.

The Court: All right. And have they tabulation sheets?

Mr. Dreher: They have tabulation sheets. Mr. Dean has an analysis and a copy of all of our worksheets in [fol. 809] skeleton form.

The Court: What is going to be on those tabulating sheets?

Mr. Dreher: The tabulating sheets will show the number of "Yes" ballots and the number of "Yes" votes; the number of "No" ballots and the number of "No" votes; and the number of blank ballots, and the number of ballots which came in with no vote recorded, in other words, if there are any blank ballots.

The Court: In other words, that same procedure is to be followed with each group of ballots.

Mr. Dreher: With each group of writer ballots and publisher ballots.

The Court: And publisher ballots, with each ballot that comes in.

Mr. Dreher: Each ballot will be handled in this fashion.

The Court: After these canvassers have canvassed these ballots, this group of 1,101 ballots, a tallysheet will be made up?

Mr. Dreher: A summary sheet will be made up, your Honor.

The Court: A summary sheet.

What will that show?

Mr. Dreher: Have you got a copy of that?

[fol. 810] Mr. Dean: Right here. Would your Honor like to see that?

The Court: No, I will see it later on. I want Mr. Dreher to explain it so that those present will know what is being done.

Mr. Dreher: Before I get to the summary sheet, your Honor, I might point out that these ballots have all—that each ballot, on each ballot there has been placed on the outside of the ballot the number of votes which should be on the inside of the ballot.

The Court: Yes.

Mr. Dreher: This was in order to prevent any tampering with the amount of votes.

Now as the ballots are opened, our checkers, our staff here, will, in addition to tabulating them, determine that the number of votes on the outside of the ballots, which is determined from the voting list, is the same as the number of votes on the inside of the ballots, which we have not seen yet.

The Court: I see. Then you are going to have an individual tallysheet, then a summary tallysheet.

Mr. Dreher: That's right.

Now with your Honor's permission, your order stated [fol. 811] that we would not individually write down a number "1" for each ballot which had one vote, we would segregate them into "Yes" votes and "no" votes and blank ballots; add up the number of ballots and indicate that on our sheet.

The Court: On your summary sheet.

Mr. Dreher: On a tabulation sheet, then to be contained on a summary sheet.

The Court: What is going to happen to the tabulation sheet and the summary sheet?

Mr. Dreher: They will be placed in evidence here, sir.

The Court: They will be handed to me.

Mr. Dreher: They will be handed to you.

The Court: But I want the summary sheet signed and the tabulation sheet signed, each sheet signed by the canvassers at the bottom.

Mr. Dreher: We have made that provision.

The Court: All right. Then they will be handed to me.

Mr. Dreher: Yes.

Now with your Honor's permission, I would just like to ask that you permit us also not to list each individual ballot, where the ballot is anywhere from one to ten.

[fol. 812] The Court: You don't have to do it at this stage.

Mr. Dreher: All right.

When that is completed, the individual teams will bring to me the results of the various groups of ballots which they have counted.

The Court: Yes.

Mr. Dreher: And I will list it on a summary sheet.

The Court: You will sort of prepare a super-summary sheet.

Mr. Dreher: That's correct.

The Court: All right.

Mr. Dreher: And Mr. Mappen will prepare a duplicate of that.

The Court: So that there will be check and double-check.

Then I want you to sign your super-summary sheet, which will be your election return.

Mr. Dreher: That's correct.

The Court: And Mr. Mappen will do the same.

Mr. Dreher: Yes, sir.

Now that summary sheet will show the number of "Yes" [fol. 813] votes, the number of "No" votes, and the number of blank votes. It will show the number of ballots and the number of votes for each one of the groups that you asked to be grouped in your order. We will also then break it down as between writers—it will be separately broken down as between writer-members and publisher-members; the total number of votes voting "Yes" will be determined. We have already determined the total number of eligible votes. We will determine for writers the percentage of eligible votes to total votes and take one-half of that percentage.

The Court: All right.

Mr. Dreher: We will for publishers determine the number of publishing members voting "Yes". We will divide that by the total number of eligible votes to determine the percentage of publisher-members voting "Yes". We will divide that by one-half, to get half of that percentage, and by adding those two percentages together we will have the

percentage of votes approving, voting "Yes" on this issue, in accordance with the Articles of Association of ASCAP.

The Court: All right.

Now will you just tell me what these other ballots are that I see laying here. I note the publishers ballots—

[fol. 814] Mr. Dreher: These are publisher ballots.

The Court: —are white.

Mr. Dreher: Gray, they are all gray, the publisher ballots. All of the writer ballots are these, in these four groups here.

The Court: They are blue.

Mr. Dreher: They are blue, and they are, all of them have been segregated merely by our teams here so they will approximately come out even when they go through our count.

The Court: How have you segregated them? That is what I would like to know.

Mr. Dreher: These are ballots having been 26 and 100 votes, writer ballots.

The Court: What is the next pile?

Mr. Dreher: The same.

The Court: Both. Now what team is going to take that?

Mr. Dreher: Mr. Leitner's team.

What team have you got here?

Mr. Wendell: From 6 to 25, and we have 101 to 250 votes.

Mr. Rubinstein: Your Honor, we have the group of ballots [fol. 815] lots from 2 to 5 votes and those over 250 votes.

The Court: And your name is?

Mr. Rubinstein: Mr. Rubinstein, your Honor.

Mr. Dreher: Your Honor, Mr. Krohn's team is the writer participants, one vote, and in this batch here we have the non-participants, one vote, except for one which has two votes, one ballot has two votes.

The Court: All right. Now I think we understand what is to be done here. Do you have any further statement then as to the mechanics?

Mr. Dean: Yes. Some of this has been covered but I would just like to finish reading this certificate.

The Court: You finish. You go ahead and finish. I hope you don't mind my interruptions, but I want it understood here what is going to be done.

Mr. Dean: (Reading)

"3. Tabs will be removed from the ballots and filed in envelopes provided for that purpose.

"4. The ballots will be slit open on the machines provided for that purpose and the number of votes on the inside of the ballot will be checked with the number of votes which we have heretofore written on the [fol. 816] outside of the ballots in order to detect any attempt to alter the number of votes.

"5. Tabulation of the votes will be made by 2-man teams so there will be a double check on the tabulation as it proceeds. The court order dated November 27, 1959 provides as follows:

"'Ballots which have only one vote will merely be counted twice and the total of the checked count will be entered on the tabulation sheet.'

"In the interest of greater speed in tabulation, we propose, if the court will approve, expanding this procedure to cover all ballots which reflect up to ten votes."

Your Honor has already ruled on that.

The Court: Yes.

Mr. Dean: (Reading)

"6. All ballots will be tabulated on both weighted and numerical basis as follows:

"1. 'Yes' votes

"2. 'No' votes

"3. Blank ballots.

"7. Tabulation sheets will be summarized separately for writers and publishers to indicate the total [fol. 817] vote on all ballots returned.

"8. We attach hereto a copy of the proposed working sheets which we will use in tabulation."

I had intended to go on and summarize the procedure, but I think your Honor's questions and Mr. Dreher's answers have covered some of this.

At the hearing on October 20th, ASCAP agreed that we would mail to its members any literature which any member wished to send to the membership. Several members did take advantage of this offer and brought in letters or postcards for mailing, and all of them were duly mailed.

I ask that the Court mark as Exhibit D a set of affidavits. These affidavits are by Mr. Finkelstein and other members at ASCAP who participated in these mailings for members.

Also attached to the affidavits are copies of the mailings themselves.

(Marked Court's Exhibit D.)

The Court: I think I should say now that any member of the Bar who desires to look at any of these papers which have been marked as Exhibits may, if he has an interest in this matter, examine them while the canvassing is going on, however, not to come within the roped-off inclosure. [fol. 818] The clerk will make them available to you.

Mr. Dean: Your Honor will recall that on October 20th ASCAP agreed to pay up to \$1,000 for any joint mailing by those who appeared before the Court at that time in opposition to the proposed consent order. Such a joint mailing was made, and is set forth in Mr. Finkelstein's affidavit, ASCAP paid \$1,000 in connection with that mailing, and the payment after deducting postage was paid to Mr. Sidney Rothstein, a member of the Bar, at their request.

I have prepared a form of oath for Mr. Dreher, Mr. Mappen and other representatives of Jerome I. Golinko, who will participate in the tabulation, and if it meets with your Honor's approval, I would suggest that these persons sign the oath and be sworn by your Honor to execute faithfully and with strict impartiality their duties in tabulating the ballots in accordance with your Honor of November 27, 1959.

The Court: Is the oath in the usual canvasser's form?

Mr. Dean: Yes, your Honor.

The Court: All right. Will you, Mr. Dreher and Mr. [fol. 819] Mappen, will you sign this and have the others sign it. There is a copy for your files, so that you know what you have sworn to, and you will know in a few min-

utes, but in the meantime, at this point, I think you had all better sign it.

Now while that is being done, I want to say that the Court has received a telegram this morning from one Bob A. Davis, asking that he have permission to change his vote on this matter. His application, which I accept in this form of the telegram, is denied. I am not going to permit anybody to change a vote which has been cast. In this case Mr. Davis would like to change his vote from "No" to "Yes". It is just too late.

Are you Mr. Davis?

Mr. Davis: Yes, your Honor.

The Court: You are too late. I am not going to permit you to change your vote.

Mr. Davis: There is a misunderstanding there, your Honor. I voted "Yes". I pledged, I made a pledge, if you read the telegram correctly, I pledged "No" to one of the groups, I don't know, I have forgotten, I think the Lopez group.

The Court: But you did vote "Yes"?

Mr. Davis: I voted "Yes".

[fol. 820] The Court: Well, the telegram reads:

"Dear Judge Ryan Your Honor though I foolishly made a pledge to vote no but after thorough examination of the overall situation I changed my vote to yes and will gladly explain why if necessary Ballot 814 yours truly Bob A. Davis."

Now I don't want your explanation, Mr. Davis, although I appreciate your good intentions and good purposes.

Mr. Davis: Well, if you check—

The Court: Your ballot has to stand as cast.

Mr. Davis: I say it is voted "Yes" if you check it.

The Court: Well, if you voted it "Yes" that is the way it is going to be counted.

Mr. Davis: Yes, sir.

The Court: All right. We will mark that as an exhibit. There will be no changing ballots at this stage. That will be Court's Exhibit E.

(Marked Court's Exhibit E.)

Mr. Dean: Just one more matter.

As your Honor is aware, under Section VII of the proposed consent order, ASCAP has to file a statement that the vote has been taken pursuant to Paragraph (A) of Section VII. As soon as the results of the voting have been [fol. 821] announced here later today in open court, assuming that they are satisfactory to your Honor, I would like to file that statement required by Paragraph (A) of Section VII. Since we have taken the actual votes prior to the time of the entry of the order, I would assume that that would satisfy Paragraph (A) of Section VII of that order, and it would not be necessary to send anything further to the members before your Honor can enter the order, assuming that the tabulation meets the requirements.

The Court: I understand these ballots are to be preserved for how long after the canvassing of the votes?

Mr. Dean: They are to be turned over to Mr. Golinko, and they are to be kept in a safe in Mr. Jerome I. Golinko's office, and they are to be kept there subject to your Honor's order.

The Court: We will turn them over to Mr. Dreher. Mr. Golinko, I hope, is up in heaven. He died some months ago. He was a very fine man. We will turn them over to Mr. Dreher and Mr. Dreher will keep them in sealed containers until further order of the Court, and I will sign a formal order to that effect.

Have you any further statement you want to make, Mr. [fol. 822] Dean?

Mr. Dean: No, your Honor. I just want to hand up to you a proposed form of order for your Honor's consideration after the announcement of the vote.

The Court: Then you have no further statement?

Mr. Dean: No, sir.

The Court: Mr. Finkelstein, you heard the statements made by Mr. Dean; do you concur in their truthfulness and their accuracy?

Mr. Finkelstein: Yes, your Honor.

The Court: And have you carried out the instructions and the trust the Court has imposed upon you?

Mr. Finkelstein: I have, your Honor.

The Court: All right. Now the decision then will be this: We will canvass the votes here in open court. After

the votes are canvassed, the Court will examine the canvassing, the return and the tally and make an announcement in court. If that is completed today it will be done today. After that, any attorney who has a right to be heard may make an application to be heard concerning any matter [fol. 823] concerning this election or anything else concerning this proposed decree, and the Court will then pass upon that application.

At this time we will not interrupt the canvassing of the votes. We will proceed first with the canvassing of the votes.

Mr. Dreher: That is executed, your Honor.

The Court: Mr. Dreher, has each and every one of you and your assistants signed this oath?

Mr. Dreher: We have all signed it, sir.

The Court: Ladies and gentlemen, will you all stand and raise your right hand, just these folks who are going to canvass.

Do you Reinhold Dreher, Aaron A. Mappen, Paul J. Wendell, Abraham Leitner, Paul I. Krohn, Maria V. R. Pugliese, Jerome E. Turkel, Edward I. Rubinstein, Jerome Goldberg, Julian M. Weiss and Lillian Rodriguez, each and severally solemnly swear that each of you will individually and for him or herself fully and faithfully and with strict impartiality and to the best of his or her ability execute the duties of teller at the tabulation of the ballots of the American Society of Composers, Authors and Publishers in open court here, in the United States District [fol. 824] Court for the Southern District of New York, at this time, January 6, 1960, at 10.00 a. m., and you faithfully swear now to carry out your duties, so help you God?

(All responded in the affirmative.)

The Court: I want again to say to you that each of you are functioning now as officers of the Court, and any wrongdoing will be in contempt of the process of the court, for which you may be summarily punished. You are functioning here as court officials under my order, and my order is that there shall be a fair and impartial canvass of these votes, and that you shall well and truly and accurately and honestly make a return as you so find it.

Now you understand the trust I am placing in you?

Mr. Dreher: We do, your Honor.

The Court: I know you will fulfil that trust.

Now I think then you can get back out of this roped-off inclosure and we will continue the court in session while the canvassing is being done. When the canvassing is through I will come back on the bench and I will be here in the meantime at various times to see what is going on, to satisfy myself that the things are going on as they should. [fol. 825] I won't stay here all the time. I don't think it is necessary. But you folks may stay here, outside of the roped-off inclosure, and when that is done, we will announce the tally and the results of your canvass.

I don't think you need stay here, Mr. Reporter, at this time, and when I require your further services I will send for you.

Now you men who are going to operate these slicing machines, better come up, and be sure you don't slice yourselves; just slice these envelopes, and when you have done that, you get back outside the roped-off inclosure.

All right. You boys can come down here now and we will file as an exhibit this oath of office that these men have just taken.

(Marked Court's Exhibit F.)

The Court: Remember, the court is in session at all times while this canvassing is going on, and nobody is to interfere in any way with the canvassing.

(The following took place in the courtroom at 4.15 o'clock p. m.):

The Court: Mr. Dreher, have you completed the canvass of the ballots?

Mr. Dreher: We have, your Honor.

[fol. 826] The Court: And have you made a tabulation?

Mr. Dreher: I have my tabulation here, and I would like to pass it up to you. There are two copies. One is the checking copy.

The Court: All right. We will mark the copy signed by you as an exhibit now.

(Marked Court's Exhibit G.)

The Court: We have another copy signed by Mr. Map-
pen. We will mark that Court's Exhibit H.

(Marked Court's Exhibit H.)

ANNOUNCEMENT OF SUMMARY OF VOTES

The Court: Now, it is my purpose at this time simply to read the summaries on these reports of the canvassing of the ballots. One copy will be available for the inspection of counsel after court adjourns today. After I read the summaries, I intend to adjourn court until tomorrow morning at ten o'clock, and at that time I will hear anybody who has an application to make.

At this time I will simply read the totals.

The total of writer-members voting "Yes" is 405,010¹/₂ votes.

There was a total of writer-members eligible votes of 495,411.

Percentage of writer-members voting "Yes" is 81.75. [fol. 827] One-half of that percentage is taken as a weighted vote, and that would be 48.88 percent of the writer-members votes which were cast for "Yes."

Now on the number of ballots of the writer-members which were cast, there were 2,976 ballots cast "Yes"; 1,285 cast "No"; 27 ballots were marked blank, and those 27 ballots which were marked blank had a total voting weight of 5,619.

On the publisher-members, the total publisher-members voting "Yes" by votes was 19,051. The total publisher-members eligible votes was 22,598.

Percentage of publisher-members voting "Yes" by the weighted vote was 84.30.

Then calculating one-half of that as taken, so that one-half of this percentage of publisher-members voting "Yes" was 42.15.

Now on the publisher-member ballots, there were 652 members who voted "Yes." There were 440 who voted "No" and there were 18 blank ballots, with a total vote for the 18 blank ballots of 67.

There is a difference of 105 votes.

Mr. Dreher: Yes, your Honor.

The Court: The reported estimated vote as reported by the accountants prior to the opening of the ballots. That [fol. 828] 105 difference is accounted for by the fact that there were a number of ballots on which the accountants had some question, and I felt that they should be counted—not counted at all, or did I rule that they should be counted?

Mr. Dreher: Counted.

The Court: Should be counted.

Mr. Dreher: Yes.

The Court: That increased it 105. In any event, the ruling that I made is so negligible in comparison to the total vote cast that it would make no difference.

However, to give you then the final summary of the voting on votes cast, one-half percentage of the writer voting members voting "Yes" is 40.88. One-half of the percentage of the publisher-members votes voting "Yes" is 42.15.

The percentage then of all members votes voting "Yes" is 83.03 percent.

Apparently the predominant vote was in favor of this proposed amended decree.

Now the clerk will keep one of these, and the other will be available for the inspection of counsel. In fact, if you keep them in your sight, let counsel look at either one, it [fol. 829] might help them, or if you want, we will be able to get photostats.

Mr. Dreher: you have one copy?

Mr. Dreher: I have one copy.

The Court: Have you some kind of a machine up in your place that makes copies?

Mr. Dreher: Not of these. These are already a machine copy. The form is a machine copy, your Honor.

The Court: All right.

Mr. Dreher: Your Honor, do you have any disposition for the supporting work sheets?

The Court: I was just going to take that up in a minute. Now you have your work sheets, have you?

Mr. Dreher: Yes.

The Court: Work sheets shall be filed with the Court as exhibits.

Now I have signed an order, Mr. Dreher, giving you custody of the ballots and of the tabs.

Mr. Dreher: Very good, sir.

The Court: Do you accept this trust?

Mr. Dreher: I do, sir.

The Court: This means that you must keep them in a [fol. 830] safe place, not permit anybody to inspect them except on order of the Court, and not to destroy or mutilate any of them until further order of the Court.

Mr. Dreher: I understand.

The Court: If this order is not obeyed, the party who violates it will be guilty of contempt of the Court. You understand that?

Mr. Dreher: Yes, sir.

The Court: Again, I am placing my trust and confidence and the trust and confidence of the court in you and in your office.

Mr. Dreher: Thank you.

The Court: All right. Now today's date is the 6th, so you will file this order.

The Clerk: I will, sir.

The Court: Now these tallysheets with the tabulations, I think it best that they be kept intact. We will mark them as exhibits. There are two packs.

(Marked Court's Exhibits I and J.)

The Court: I don't think those tallysheets should be examined this evening. If anybody wants to look at them, we will try to make them available the first thing in the morning. But I feel it will lead to too much confusion to have them examined this evening.

[fol. 831] However the summary sheets of the balloting may be looked at, and if tomorrow morning any of you want to look at those tallysheets, you can make an application to me up in chambers before the court opens. I will be here, with the help of the Lord, at half past eight, and you can come in and see me.

Mr. Barrett, I wonder—where do you live?

The Clerk: Queens, Woodside.

The Court: Would half past eight be too early for you tomorrow morning?

The Clerk: Not at all, sir.

The Court: If you will be here tomorrow morning up in my chambers with these papers, I would appreciate it.

The Clerk: Fine.

The Court: And will you keep them overnight.

The Clerk: I will, sir.

The Court: Now the summary of the ballot sheets, these two exhibits that you have there—H and G is it—they may be inspected by counsel or by anybody in your view—you are not supposed to leave them get away—this evening. The individual ballot canvassing sheets may be looked at [fol. 832] tomorrow morning on application to me or an application made here in court.

Now we will adjourn now until tomorrow morning. Can you make it 10.30 tomorrow, gentlemen, instead of 10? Will that be all right?

(All counsel indicated in the affirmative.)

Mr. Fishbein: Your Honor, may I ask one question while I am here?

The Court: Yes.

Mr. Fishbein: If I understood it correctly, there were 652 ballots; publisher ballots, cast "Yes" on the numerical, 440 "No" and 18 blank.

The Court: That's right.

Mr. Fishbein: Now, the eligible votes on the publishers as against the weighted vote was 22,598. Could we get the eligible votes on the publishers numerically? Has that been tabulated?

The Court: What do you mean by numerically? How many publishers could have voted?

Mr. Fishbein: Yes, as distinguished from the weighted count on both the writer and the publisher.

The Court: Is that readily available? I think we have that.

How many publishers could have voted by number?

[fol. 833] Mr. Mappen: 1,365.

The Court: 1,365 could have voted, and you say you have a total there that runs over 1,100?

Mr. Fishbein: Yes. Could I have the same tally on the writers eligible to vote, numerically?

The Court: Yes. You have 1,300. That 1,300 has not been broken down into groups, you know.

Mr. Fishbein: Yes, I understand.

The Court: What is your name, sir?

Mr. Fishbein: Arthur L. Fishbein.

The Court: And you represent whom?

Mr. Fishbein: Charles K. Harris Music Publishing, Southern Publishing Company, LaSalle Music Publishing.

The Court: You were heard at the last meeting?

Mr. Fishbein: Yes, on October 9th.

The Court: And I am hearing you now as a friend of the court.

Mr. Fishbein: Thank you very much.

Mr. Mappen: There were 5,092 available ballots of writers.

The Court: 5,092.

[fol. 834] Mr. Mappen: Yes, sir.

The Court: Of writer-members.

Mr. Mappen: Writer-members.

The Court: 5,092, and you had a vote cast of approximately forty-two hundred-odd.

Mr. Fishbein: 4,218.

The Court: I haven't pencil and paper and I just hurriedly looked at the numbers.

All right then, gentlemen; we will adjourn until 10.30 if it is agreeable to everybody. Ten-thirty tomorrow morning.

(Adjourned to Thursday, January 7, 1960 at 10.30 o'clock a. m.)

[fol. 836] COLLOQUY BETWEEN COURT AND COUNSEL

The Court: We had, when we adjourned last evening, the canvass of the ballots filed, and they have been made available to anybody for inspection who wants to look at them.

Mr. Dean, I will hear you. I see you standing. You apparently have something you want to say.

Mr. Dean: I would like to hand to your Honor certification by Mr. Adams, the President of the American Society of Composers, Authors and Publishers, pursuant to Section VII of the proposed decree, the consent of the membership as required by the Articles, has been obtained.

The Court: We will file that then as an exhibit in this proceeding.

(Marked Court's Exhibit K.)

The Court: All right.

Mr. Dean: I would also like to hand to your Honor a proposed order, that has been consented to by the Government and myself, as counsel for ASCAP, that changes the dates appearing, in accordance with the memorandum we submitted to your Honor, because of the change in time from the time of the entry of the order, from last October to the present time.

The Court: Well, I have examined these proposed [fol. 837] changes dates. It is simply to make the decree more workable that these changes have to be made, and to conform with the time which has elapsed while this proposed consent decree was pending before me.

I see no objection to this, and I will approve it.

Mr. Dean: I have handed up, your Honor, this proposed order that has in it these changes of dates.

I would also like to hand to your Honor a form of order approving this proposed consent decree, and I would like to move the approval of the consent order, further amending the amended final judgment, entered in this court on March 14, 1950.

It recites that the ballots have been tabulated in open court on January 6th, and the court has found that as a result of the balloting of the total eligible votes of writer-members, weighted in accordance with the Society's present Articles of Association, 81.75 percent of the votes were cast in favor of approving the proposed consent order, and that the total eligible votes of publisher-members, weighted in accordance with the Society's present Articles of Association, 84.30 percent of the votes were cast in favor of the [fol. 838] proposed said order and said amendments to the Society's Articles of Association; and that averaging these two results, as provided in the Articles of Association, that this represents 83.03 percent, which is more than was required by said Articles of Association to amend them.

It also recites that the court has found that of the members actually voting, 2,977 writer-members and 652 pub-

lisher-members voted in favor of said proposed consent order of the amendments; 1,285 writer-members and 444 publisher-members voted against it.

And it recites the filing of the certificate by Mr. Adams, as President of the Society, that the consent order and the amendments have been duly submitted to the members and have been adopted.

MOTION FOR APPROVAL OF PROPOSED CONSENT DECREE

Mr. Dean: It is my understanding that counsel for the Government join me in moving that your Honor now sign the proposed consent order further amending the final judgment.

Mr. O'Donnell: Yes, your Honor, we join in that motion.

The Court: I think at this time then any applications by any lawyer who requests to be heard as a friend of the [fol. 839] court should be entered, and I will hear them now.

Well, you are the nearest. Suppose you tell me what you have in mind and give your name and whom you represent.

STATEMENT BY MR. ROTHSTEIN

Mr. Rothstein: Sidney W. Rothstein, representing Gem Music Company, Denton & Haskins and Barney Young.

The Court: Mr. Rothstein, and counsel and other people who apply to be heard, I don't want any reiteration of extended arguments that we had before.

Mr. Rothstein: No, sir.

The Court: Carry on from that point and make any application you have.

Mr. Rothstein: I will apply myself solely to the vote as was tallied yesterday.

The Court: Anything you have in mind that you feel is relevant, I will listen to you as a friend of the court.

Mr. Rothstein: And of course my position, as your Honor well knows, is to urge the court to unequivocally reject the proposed decree.

I urge firstly, sir, that the court accord no probative value to the weighted vote, for this reason:

[fol. 840] The Government itself has found—and this is not controverted by ASCAP—that the weighted-vote formula as it now exists in ASCAP frustrates the intent

and purpose of the 1950 consent decree, which is still in force and under which we are still bound.

These statements are contained in the Government's memorandum, which was submitted originally in support of the proposed decree, because it is shown that less than one percent of the publishers have over 50 percent of the weight on that formula and less than 5 percent of the writers have over 50 percent of the weighted vote for writers.

Under these circumstances, it certainly appears to me that the weighted vote does not properly reflect the true sentiment of the membership of ASCAP, and it cannot properly so reflect it, and I therefore think that the court should completely disregard the results of the weighted vote.

The Court: Well, there is something that is fundamentally wrong with that position. In any corporation, where stock is widely disbursed and publicly held, the holdings are in varying amounts.

Mr. Rothstein: This is entirely different, sir.

The Court: Well, it is not entirely different. It is some- [fol. 841] what analogous. The weighted vote is in considerable extent and is measured by what the members' product produces by way of revenue.

Mr. Rothstein: In a corporation, your Honor.

The Court: In a corporation it is measured, the right to vote is measured by the amount of money—

Mr. Rothstein: That the stockholder has invested.

The Court: —that the stockholder has invested in the corporate affairs and in the corporate fund. And so here, too.

Mr. Rothstein: But this is not a profit-making organization.

The Court: To say that it is not a profit-making organization is just ridiculous. What is the twenty-seven-odd, twenty-six million dollars that is collected each year? Is that a loss? It is a business venture.

Mr. Rothstein: Not for the benefit of the organization as such.

The Court: It is for the benefit of those who have contributed to the common fund.

Mr. Rothstein: Of course.

The Court: And their contributions have been by a con-[fol. 842] tribution of property rights. A copyright is a property right; a right to public exhibition is a property right; and it is definitely measurable in law in terms of dollars and cents. We do it every day here. You know that as an expert, as I recognize you, in the copyright field. And for you to say, number one, that this isn't a profit-making organization, is not—

Mr. Rothstein: I mean not in the sense of the organization itself.

The Court: —is not being properly realistic; and for you to say that the revenues or collections shouldn't bear some relation to what each has contributed to the means by which these revenues are gathered, is not realistic.

Mr. Rothstein: No, sir; but if the formula on which that relationship is presently based is found to be inequitable and unjust, then I say any results based on that formula should not be considered by the court because that is one of the reasons why we are here today attempting to amend that decree.

The Court: Well, I indicated at an early date that I was not going to attempt to regulate too much the internal affairs of ASCAP; that my concern with their internal [fol. 843] affairs was solely confined to the enforcement of our antitrust laws. Now if any party that you represent wants to withdraw, they now have that permission; they can withdraw from ASCAP any time they want to. They have an unlimited right of withdrawal. They don't have to stay in and be bound.

My reaction, when I first read this proposed amended final judgment, was that it was, number one, an improvement over the present decree; that perhaps it wasn't perfect, but that there has to be somewhat of a trial-and-error procedure followed here. The Government has examined this; they have studied it, they have had experts, they have had economists and analysts look over this proposed amended decree, and I have every reason to believe that the Antitrust Division is fulfilling the purpose of its function advisedly and to the best of their ability, and if this system

that is now being set up doesn't work, we will find it out and it will be changed.

The decree provides, as I recall, for the appointment of experts who are to watch and see how this functions and to give a report to the court; and I indicated before that I in [fol. 844] tended not to appoint another expert to supervise the work and the workings of this plan of distribution, which we are now setting up, but I intend to appoint two practical, fair-minded, impartial men, in whom I have implicit faith and confidence, both as to their honesty, their integrity, their personal integrity, and their business judgment; and I indicated before that if these men would accept the designation, and the time came when I would have to make such a designation, I would appoint a former justice of the Supreme Court, John E. McGeehan, and former United States Senator Irving Ives.

When I spoke to them about it several months ago, neither one of them was too enthusiastic about taking the designation and the appointment, but I feel that there is an opportunity for public service for these men, and they both gave me their consent several months ago. I hope they haven't changed their mind in the interim. I haven't spoken to them for several months.

Now this proposed decree, final judgment, is the result of negotiations which were carried out at arm's length by the Antitrust Division. It is what you yourself tried to accomplish in some measure some months ago, some many [fol. 845] months ago, when you sought to intervene, didn't you?

Mr. Rothstein: Yes, I sought to intervene.

The Court: And I felt at that time that this matter was being taken care of by the Antitrust Division. The only complaint I make about them is that they bring too many of their suits here in New York, in the Southern District. I found them diligent, I found them fair, and I have found them most competent, and I think that their competency and their diligence and their fairness is reflected in this proposed consent decree, and that was my reaction when I looked at it.

Mr. Rothstein: I would like to make this further comment, sir, and that is this. ASCAP is a voluntary, unincor-

porated association. Therefore, in effect, all the members of ASCAP are, in reality, defendants in this case. Now as such defendants—

The Court: Well, juristically, they are not defendants in a federal court. Where men in business enterprises have combined into one association, under federal practice they are recognized as a juristic person.

Mr. Rothstein: Yes, sir, but that is procedural only and does not affect the substantive law.

[fol. 846] The Court: Well, if it doesn't, then you are the first one to question it in almost twenty years of operation on a consent decree. This decree, which is now being further amended, was first entered in this court in 1940.

Mr. Rothstein: I am not questioning the jurisdiction of the court to enter the decree, because certainly an association may be sued in its own name. I am merely pointing out that in effect the members themselves are the defendants, and as defendants their potential liability is not measured or proportioned by the weighting classifications they have in the Society. That is the only other point I wish to make.

The Court: I don't feel that it is a realistic approach for you to say "We shall count the members of ASCAP by head only," and say, "Numerically, there are so many members of the Society" without taking into account their contributions. You yourself may get an inspiration and come forth with what you believe to be a melody.

Mr. Rothstein: Not me.

The Court: Well, you may. You can never tell what the future holds forth in the shape and form of these strange [fol. 847] events. You may conceive yourself to be a musician tomorrow, or I may—suppose I make it more personal, myself—if I came out with some melody and somebody loves it on television solely by reason of admiration for the theme and for the syncopation presented in my composition, and that is my one and only effort, I certainly shouldn't have as much to say as an Irving Berlin, should I?

Mr. Rothstein: Well—

The Court: I might have as much to say, I might have more to say, but I shouldn't have the power to carry out my wishes in any proportion to men of that type.

Mr. Rothstein: I don't know if your Honor is aware, but up until about twenty years there was no weighted vote, it was a vote by unit.

The Court: I remember prior to the Hotel Vanderbilt case, everybody was playing everybody else's songs and the writers and composers were getting nothing. You remember that; I think you are old enough to remember that. At least you have studied it in the law books.

Mr. Rothstein: I have studied it. I don't remember it personally.

The Court: Those were exciting days.

[fol. 848] Mr. Rothstein: Yes. I wish to say this further, your Honor. In my opinion there has been no consent evidenced here on the part of the defendant.

The Court: I hold the contrary view.

Is that all you have to say?

Mr. Rothstein: May I state why I feel there is no consent?

The Court: Certainly.

Mr. Rothstein: I will not take more than two minutes to state it.

The Court: Certainly.

Mr. Rothstein: Less than 50 percent of the publishers eligible to vote actually voted in favor of the proposed decree. Even taking it on the proportion of those who actually did vote, less than 60 percent of the publishers voted in favor of the proposed decree.

The Court: Now wait a minute. Just stop right there. When you say "eligible to vote" it is similar to our elections. Not every eligible voter exercises his right of franchise.

Mr. Rothstein: True, sir.

The Court: And yet we have to take the will of those who do exercise their right of franchise.

[fol. 849] Mr. Rothstein: I use that figure, too, your Honor.

The Court: Now here, even on the number—

Mr. Rothstein: Less than 60 percent, a fraction under 60 percent, unless my mathematics are inaccurate—

The Court: No, I think it is just about 60 percent.

Mr. Rothstein: Yes, sir.

The Court: There were total votes of the publishers number voting "Yes" of 652, and there were 440—

Mr. Rothstein: I have 40.3 percent opposed but I won't quibble over that .3 of one percent.

On the writers who actually did vote, approximately 58 percent, or rather, approximately 68 percent or 69 percent voted in favor—approximately 58 percent of the total eligible writers voted in favor.

Now, of course, your Honor, we are concerned with the concept of a consent decree, and what is a consent decree? The word implies consent, permission, and it is a simple word, very easily susceptible of definition, and I am very strongly urging that where—

[fol. 850] The Court: Yes, but where these men and these writers and these publishers have by their own agreement said to us, "What should constitute consent"—

Mr. Rothstein: And the Government has found that ASCAP violated that, in its own memorandum, which has been submitted to your Honor, and I emphasize this point for this reason: the consent decree we are concerned with today presents a sort of anomalous situation. I don't think there is any similar consent decree existing anywhere in any of the courts in this land, and in this respect: the decree seeks to protect the users of music against the practices of ASCAP, and at the same time the decree is giving protection to the members of ASCAP themselves, who are really the defendants, against the actions of the management of ASCAP.

The Court: I wonder whether at times the members of ASCAP, even those whom you represent, fully appreciate the burden that has been cast upon the court by reason of their own wrongdoing, and what the court is doing to see that their investments bring a return? I wonder if you men who represent these principals, these writers and these publishers, ever explained it to them in detail that ASCAP has in effect an unpaid czar of its industry, paid and supplied by the Government?

[fol. 851] Mr. Rothstein: Well, we are well aware of that, sir.

The Court: Do you know that during the past year I have devoted over one month of judicial time simply in

fixing fees which ASCAP should collect from the various fields of endeavors, from the radio stations, the television stations, for the use of Muzak; and that if the court didn't undertake to do this work, you wouldn't be collecting your \$26 million that you are dividing? You know, this is an intolerable burden that has been cast upon this court, and I don't know whether such a burden was ever within the contemplation of those who originally voted and passed this law when it was first put on our books.

Mr. Rothstein: Well, I would say, in all probability it wasn't, but—

The Court: I am glad that you and I agree on one thing.

Mr. Rothstein: No, but I wish to emphasize, your Honor, that this decree in part exists for the protection and the benefit of the members of ASCAP themselves. That is, regardless of the weight and classification that is accorded to them in the Society, each and every member of ASCAP, [fol. 852] even the lowest classification, is entitled to the benefit of this decree, because the decree gives it to them. And where you have such a large number of members, numerically, who are opposed to this decree, then I say to your Honor that there is no consent, and I say also to your Honor that under the meaning and the interpretation, as I read it, in the language of Rule 24 of the Rules of Federal Civil Procedure, that the Government has not adequately represented the interests of these people.

The Court: Oh, I think the Government, the Antitrust Division, has done a splendid job.

Mr. Rothstein: I am not talking about their efforts, Judge. What I am saying is when there is such a degree of dissention and disagreement with what the Government has done—

The Court: Why don't those who don't want to stay in ASCAP get out of it?

Mr. Rothstein: Because they can't. I am not saying they can't physically, of course.

The Court: A number of them did.

Mr. Rothstein: They can resign.

The Court: A number of them are already out of it. They are connected with your competitor, the Broadcast [fol. 853] Music.

Mr. Rothstein: Your Honor, Broadcast Music is not a writers organization. Essentially it is a publishers organization.

The Court: Well, I have my ideas of what it is essentially, but it is not performing illegally.

Mr. Rothstein: I mean in its practices—I didn't mean legally—I mean in its practices; and the great bulk of its money goes to the publisher-members and not to its writers. In effect, as a practical matter, there is no place for the writer to go outside of ASCAP. He can't go any place. There is no question that if there were a place to go he would have gone. In fact, in about 1936 the Warner Bros. companies, which are the biggest single unit in ASCAP, withdrew from ASCAP, and even such a powerful combine found they could not buck the system—that was before there was a BMI—and within one or two years they had to come back to ASCAP and seek membership again; they couldn't exist without ASCAP. That is the case with the individual writers as well. There is no place for them to go.

The Court: Frankly, I don't know how long this ASCAP situation is going to continue. I think it calls for remedial [fol. 854] legislation.

Mr. Rothstein: That is my own opinion.

The Court: Of what nature, is not for me to determine, but I think under our present law and under the facts now before me, this decree should be approved.

Mr. Rothstein: Well, I have stated my position in opposition.

The Court: All right, Mr. Horsky. You don't have to come up here and use that lectern if you don't want to, or if you feel better off, come up and use it.

STATEMENT BY MR. HORSKY

Mr. Horsky: Quite all right to speak from here, if it is all right with you, sir.

The Court: All right.

Mr. Horsky: I will be very brief. I have only one basic point that I really wish your Honor to give serious consideration, and I am aware of the debates we had on October 20th as to the alternatives before your Honor, if this decree were not approved.

What I would like now to call to your attention, sir, is the fact that we now have a real additional alternative which was not then apparent. The result of the vote which was announced yesterday afternoon in court shows that there is in ASCAP now not merely a few dissident, dis-[fol. 855] loyal, unhappy people, but that there is in ASCAP a vast group, spread, as the tabulation before you will show, throughout the categories in ASCAP, the big publishers, the little publishers, the big writers and the little writers, who join with the people whom I represent in hoping that this decree will not be approved.

Now that group represents on an overall basis some third of the total membership, and it represents a larger proportion, indeed, of the publisher-members.

That leads me to say this, your Honor. You have before you now one further alternative. These people who have negotiated this decree now know for the first time the extent to which it does not command the enthusiastic support of the members of ASCAP. It would be incredible to me if the Board of Directors and the officers of ASCAP, to say nothing of the members of the Department of Justice, were they to sit down again and renegotiate further on the matter of this decree, would not feel it wise, would not feel it, in fact, essential, to come to some further agreement which would command a measure of much larger support from the members of ASCAP than this proposed decree has commanded, as this election shows. That negotiation [fol. 856] could be done promptly. If I am wrong in what I suggest would happen, the most we have lost is a little time. If I am right, and this further negotiation, which would be made possible if you would suggest to them that this consent does not seem to you the kind of consent that a decree of this sort should command, that further negotiation might produce, might well produce a decree which would let the membership of ASCAP really get together and march forward in progress and in agreement, as I am sure that they all would love to do.

Now that, your Honor, seems to me to be a real alternative which is open. It requires for it to be accomplished, only that you suggest on the basis of this election that there is throughout ASCAP too much disagreement, too much

unhappiness with the decree which is before you now, for you to say that "I think I will sign it without more ado."

The renegotiation need not take long, and I may be overly optimistic but the most you would lose by that mode of conduct is that he will just report back to you further that nothing could be done. I don't believe that would be true because I don't believe these people on the Department of Justice side and on the side of the officers and directors of [fol. 857] ASCAP fully appreciate the degree to which the entire membership, not just the little ones, not just the people who had no particular interest in ASCAP because they had only one vote, but the people all up and down the line, disagree with the principles and with the results that had been reached in these negotiations. That is a very new fact and it is a very significant fact.

Now let me say only a word, your Honor, on why these figures are perhaps even more meaningful than they appear on their face.

The Court: Well, let me interrupt you just a moment.

Mr. Horsky: Yes, sir.

The Court: Let me tell you that this matter has already been pending before the court, and has been under consideration by the court since the latter part of June.

Mr. Horsky: That's right, sir.

The Court: So that the action that the court takes is not hurried, rash or without due consideration.

Mr. Horsky: I made no such suggestion, if your Honor please.

The Court: That is the first observation I have to make. [fol. 858] The second observation is this. That you are dividing approximately 24 or 25 million or 26 million—I don't know how much it is; it goes up each year—among 6,000 people, six thousand-odd people, writers, publishers, individuals, estates and corporations, widows and orphans, and those who are otherwise situated.

Now when you divide that amount of money amongst that number of people, human nature is such that you are not going to get any extent of unanimity of opinion because few men are content with what they receive in this life, even though their neighbors may feel they are getting far more than they ever either earned or deserved.

Now I am surprised that there is such a large number who have consented, because it shows that even balancing their own selfish interests against the proposed plan, they have determined, "Well, perhaps this isn't as much as we should get, but we think it is fair."

Now this isn't any permanent arrangement in that it presents an irrevocable situation; we have provided—and at this point I am looking through the decree and I don't see the provision in here—for the appointment of these two sort of supervisors.

[fol. 859] Mr. Dean: Section II, subdivision (C), your Honor. It is on page 4 of the printed proposed order I handed you this morning.

The Court: I am going to change that and make it "two qualified independent persons."

Mr. Dean: That is agreeable to the defendant, your Honor.

The Court: And it is provided that they shall examine—the way this operates and the way I contemplate it, is that they shall file a report so that we can see how it is operating.

Mr. Dean: I have here a proposed form of order for your Honor's consideration, pursuant to that section.

The Court: And I suppose I look at it and read it out to Mr. Horsky and see what he thinks about it.

It recites the provision I have no doubt you are familiar with, Section II, subdivision (C), and the order part reads that "The Hon. John E. McGeehan and the Hon. Irving M. Ives, each of whom is a qualified independent person and not an employee of either of the parties, are hereby appointed to examine periodically as is necessary the design and conduct of the survey provided for in Section II, to [fol. 860] make estimates of the accuracy of their sample and to report thereon to the court."

And "It is further ordered that the Society shall pay the salaries and the reasonable expenses of said persons, the salaries to be fixed by the court upon the application of the persons or the defendant ASCAP."

Now, we contemplate not an irrevocable situation, but we contemplate by this decree a change, which I feel is a change for the better, and we are going to see how it works out, and we are going to get the reports from these men to

see how it is working out, and then in the light of our experience gained as a result of operations under this decree, the Department of Justice can come in at any time they are advised to do so to make further application to the court, and I think that is the best way to operate this.

I don't say and I don't find that this plan, which we are now putting into effect, is forever going to remain the plan in operation, but it is a plan that we are going to work under and we are going to see how it operates. We are going to see if it is an improvement, and by the operation of the plan we will see whether there are any further improvements required.

[fol. 861] Now, I can't see anything wrong in that.

Mr. Horsky: Well, that, I agree, is good, your Honor.

The Court: That, in substance, is what you are asking me to do.

Mr. Horsky: No.

The Court: So I am, in substance, doing just as you request.

Mr. Horsky: No. I am making a wholly different suggestion, your Honor. I am suggesting to you that when there is submitted to you a plan which, after vigorous campaigning by the Board of Directors and officers, can command no more than a 56 percent approval of the members of this Society, that it would be perfectly appropriate, and indeed, highly desirable for these negotiators to try and again see if they can't get one that will command an additional 25 or 30 percent. Certainly you will never get unanimity on the plan, and none will ever expect that all of the members of the Society will agree.

The Court: No, but you have lost sight of the fact—I don't think you have lost sight of it; you are too astute a lawyer to lose sight—and too able a lawyer to lose sight of it—but perhaps I should say you don't give due weight [fol. 862] to the fact that (1) there is a consent decree, and the parties defendant have to consent to this.

Mr. Horsky: No. I have said to your Honor—let me repeat what I said, because I want to be sure you understand my point. I don't believe that at the time that this decree was negotiated by these parties, and I am including the defendants, your Honor, as well as the Department of Justice, there was any belief that so large a number of

members of the Society would disapprove it; that it would command the support of so few members of the Society. That fact became known yesterday for the first time. That fact became known as a result of your Honor's own suggestion. We had a head count as well as a weighted vote.

The Court: It became known factually and was established factually, but realistically, looking at the situation, anybody with experience and common sense would say that it would be even most difficult to get a majority, much less 58 percent, to agree on how \$24 million should be divided amongst—

Mr. Horsky: I don't believe that, your Honor. I really don't believe that.

The Court: Well, I think you don't give due weight to human cupidity.

[fol. 863] Mr. Horsky: I believe, your Honor, that in most societies which have—

The Court: Which have money.

Mr. Horsky: —which have money and which are dividing up properties, if the members have confidence in the way the society is run, if it is democratically administered and they can throw out the people at the top if they don't like the way they are running it, they will be content with the constitution. You can get an agreement on what a constitution should be, which is what this consent decree is.

The Court: In many of our own public elections, aren't the elections determined by a very small percentage of the majority of those voting?

Mr. Horsky: Not very small in this country, happily.

The Court: Well, you would be surprised. If you look at the history of New York, you might find differently, particularly on a state basis.

Mr. Horsky: But in this situation—

The Court: And if you take the popular vote throughout the country, even on a high federal office, you will find that the popular vote differential is far closer than the [fol. 864] presidential electoral vote.

Mr. Horsky: Certainly, but what I want to be sure of is that you understand my point. I have a point that I want to be sure you understand. If you reject it, very well, but I hope I won't have to sit down until I am sure I have gotten across to you.

The Court: I think you have to give me credit for understanding what you have so explicitly set forth. I give you credit for being able to very efficiently and competently set forth your views. You have done that.

Mr. Horsky: Very well.

The Court: I hope that you give me some measure of credit and some measure of understanding. I do understand your point. I don't agree with it.

RENEWAL OF MOTION TO INTERVENE AND DENIAL THEREOF

Mr. Horsky: Very well. If that is a fact, sir, that is all I need to say.

Let me, in conclusion, because I am not perfectly certain as to either the nature of the record that has been made here, or my particular status, renew my motion for leave to intervene at this time.

The Court: Yes. Your motion to intervene is denied. You had better state on the record who your clients are. [fol: 865] Mr. Horsky: I have already done so in the earlier hearings, sir. They are unchanged.

The Court: They are unchanged.

Mr. Horsky: Yes.

The Court: Your motion to intervene is denied, and your clients have surrendered their right to appear individually in this suit by subscribing to the Articles of AS-CAP, and I have heard you as a friend of the court.

Mr. Horsky: Yes.

The Court: And particularly since the case has proceeded to final judgment we cannot in an instance such as this permit intervention, and except in such cases where there has been a showing that the Government is failing to fulfil its full duty and obligation, and there has been no such showing, and I so find.

Mr. Horsky: Right.

May I now ask another question?

The Court: You have an exception to my ruling.

Mr. Horsky: I beg your pardon?

The Court: You have an exception to my ruling.

Mr. Horsky: Thank you.

The Court: And if you want to present a formal order you may do so, but it is not necessary.

[fol. 866] Mr. Horsky: All right.

The Court: I formally deny upon the record your application to intervene as a party defendant in this suit.

COLLOQUY BETWEEN COURT AND COUNSEL

Mr. Horsky: May I move to another subject, your Honor?

The Court: Yes.

Mr. Horsky: At the hearing on October 20th Mr. Dean stated—and I think the page reference is—

The Court: What date? The 20th?

Mr. Horsky: Yes.

The Court: Yes.

Mr. Horsky: —at page 329 of the transcript, that in connection with the new election procedure, in which 12 percent of the votes are entitled to nominate and elect a director, that he would be glad to have the Society—and I read—"We will arrange for these members who wish to get up such a petition to sign it secretly, and the ASCAP Board will have it examined by an independent board of auditors without indicating the names to the ASCAP directors so that there won't be any fear of reprisal."

The Court: Wait a minute. I don't see where that is.

Mr. Horsky: Pages 329 and 329-A of the transcript of [fol. 867] October 20th hearing. I will hand this up to your Honor, if you would like to have it.

The Court: I guess you have the same as I have.

Mr. Horsky: Have you October 19th?

The Court: I have October 20th.

October 20th, page 329.

Mr. Horsky: The very bottom of the page, your Honor.

The Court: I see it, the last paragraph.

Mr. Horsky: Yes.

The Court: I have it.

Mr. Horsky: My request, sir, is whether you would be willing at this time to suggest, or maybe we can arrange to have the Golinko Company be the people who would undertake that responsibility for ASCAP, in view of the splendid services they have rendered on this previous election.

The Court: I don't recall just what this concern. Now what do you want?

Mr. Horsky: There is a provision in the decree which provides that upon petition filed by publishers or writers, representing 12 percent of the weighted vote, a director may be designated by them as their director. They will then become ineligible to vote in the general election for [fol. 868] directors. The charge is made that this would be difficult of accomplishment because of the fear of reprisals of people who in effect fought the official slate of directors, and Mr. Dean stated, as I say, that he would arrange therefore, in order to avoid any fears of reprisals, that petition, which would be circulated necessarily to obtain this 12 percent of the total weighted vote, could be done secretly and would be examined secretly by an outside firm of auditors.

My request is only that at this time may it be made clear that the Golinko firm should be that firm?

The Court: Well, I haven't any request before me, have I?

Mr. Horsky: I am just trying to clarify the situation.

The Court: As I understand it, the proceedings that you contemplate, it would be that if 12 percent of the voters, those entitled to vote, 12 percent, would sign a petition in order to determine whether or not it was 12 percent, that would be checked up by an independent accountant.

Mr. Horsky: That's right.

[fol. 869] The Court: And they would file a report.

Mr. Horsky: That is what Mr. Dean suggests.

The Court: Well, are you still of that opinion?

Mr. Dean: Yes, I confirm that. I confirm what I said at page 329 and 329a on October 20th.

The Court: Well, I don't see any occasion at this time to sign an order on that.

Mr. Horsky: No, no. I think if we all understand it, your Honor—

The Court: I would be inclined, if a petition were filed, on notice to me and to the parties to the suit, to ASCAP and to the Government, to have it examined and checked over confidentially by Golinko & Company and let them file a report to me. The report will state whether or not there were 12 percent by way of votes who have signed this petition.

Is that correct?

Mr. Horsky: That's correct.

The Court: And would the petition be kept secret?

Mr. Horsky: That is what Mr. Dean suggests, and I certainly endorse that.

Mr. Dean: Yes, it would be kept secret, your Honor.

[fol. 870] The Court: Secret from whom? Who would be entitled to have it?

Mr. Dean: Well, it has been stated here that this provision—it is on page 11 of the printed decree; it is subdivision (E) of IV, that any group of writers entitled to cast 1/12 of the votes could get up this petition, and somebody said, "Oh, well, that is meaningless; and it is hogwash because the writers would be so afraid of reprisals from the Board of Directors that they wouldn't dare do it."

It was at that point I got up and said, "Well, if they want to do it, we would be quite willing to have an independent firm of auditors examine that petition, so that the names of those people will be kept secret from the Board of Directors, so that there will be no fear of reprisal."

The Court: I just want to see how this would work. I don't want to complicate the situation by having it affect our present proposed amended consent decree, but I don't see that there would be any objection if your principals, Mr. Horsky, presented a petition and said that you represented parties whose names you would disclose to the court in confidence, so that I can send it to Golinko, then we could [fol. 871] have it checked up to see whether or not they did constitute 12 percent of the vote, and once that has been done, then a director would be elected by that 12 percent, but at that point then—

Mr. Horsky: At that point the secrecy has to stop.

The Court: —at that point there would be no secrecy.

Mr. Horsky: That's right.

The Court: You understand that.

However, I am not going to rule on that now. It is not before me officially and formally. I will rule on it when it does arise, and I don't like to make rulings on hypothetical situations.

Mr. Horsky: This is not hypothetical, your Honor.

The Court: Well, it is hypothetical in that it is not before me.

Mr. Horsky: Yes. This is merely—

The Court: You agree with me, don't you?

Mr. Horsky: This is merely to try to tidy up the procedure which we have agreed on.

The Court: It is hypothetical because I have nothing before me.

Mr. Horsky: That's correct.

[fol. 872] The Court: So that from a juristic point of view, you and I, as members of the Bar, have to accept it as a hypothetical situation. I am not ruling on hypothetical situations.

However, I will go so far as to say this, I will be inclined to accept the statement of Mr. Dean's and your request now as being a great measure of guidance as to the course I might take.

Mr. Horsky: Yes, sir.

I should also like to point out for Mr. Dean that when I make such an application, I will also add that of course it will be necessary—

The Court: Well, you can point out to him all these matters in private or by letter but I don't think you should point them out now, because the matter may come before me for determination, and I prefer that it come before me on formal papers.

Mr. Horsky: Very good.

The Court: Yes, sir.

STATEMENT BY MR. ANDERSON

Mr. Anderson: May I be heard?

The Court: Certainly you may. What is your name, sir?

Mr. Anderson: My name is Roy Anderson.

The Court: Mr. Anderson, you were here at the last [fol. 873] hearing, as I remember.

Mr. Anderson: I was here yesterday.

The Court: You are not a member of the Bar, are you?

Mr. Anderson: No, sir, I am not. I represent a group of people.

The Court: Well, do you represent yourself?

Mr. Anderson: No, sir.

The Court: Have you any interest in this yourself?

Mr. Anderson: Not from the commercial point of view.

The Court: Well, then, I can't very well hear you because if I did, I would let you be practicing law without a license.

Mr. Anderson: Can I serve as attorney for these people in the absence of—

The Court: Are you a member of the Bar?

Mr. Anderson: Well, I am a citizen, sir.

The Court: I know, but if every one of our citizens came in here and wanted to be heard, I wouldn't be able to do much.

Mr. Anderson: I don't want to be heard, your Honor. I wanted a point of information from the court.

[fol. 874] The Court: Well, I am not here to answer questions except—

Mr. Anderson: You see, I don't know the legal terminology but—

The Court: I suppose the quickest way would be to ask you, Brother Anderson, irrespective of your right to be heard, just what is on your mind.

Mr. Anderson: I hope it isn't to be considered presumptuous, but we have a little citizens music committee that we have organized and—

The Court: Who is "we"?

Mr. Anderson: Well, I have the names here in case they want to be read into the record.

The Court: Where is this organization?

Mr. Anderson: In Mount Vernon, New York.

The Court: Mount Vernon is next to my home county, where I have lived all my life. It is next to the greatest county in the country.

Mr. Anderson: Well—

The Court: You know what county I refer to, don't you?

Mr. Anderson: Yes.

The Court: All right.

Mr. Anderson: Well, I was designated to come down [fol. 875] here and if possible inject myself—

The Court: Are the people you represent just music lovers?

Mr. Anderson: Plain music lovers, and we characterize them as listeners, radio and TV listeners.

The Court: All right. I play the stereo—I don't play it, but they play it at home and once in a while it is real entertaining.

Mr. Anderson: Once in awhile.

The Court: Yes.

Mr. Anderson: Well, the point is a very simple one, and that is I think many people often wonder why they don't hear certain music over the airwaves, and the average citizen—

The Court: A lot of people wonder why they do hear certain music. It works both ways.

Mr. Anderson: —and in that this antitrust action has been taken and concluded in 1950, indicating that ASCAP is a monopoly, I suppose that would mean that ASCAP has a monopoly of American music, so that acting as a monopoly, I assume the Antitrust Division acted in the public interest. But we wonder if the public interest isn't not also served in the listening end, and we have made a request [fol. 876] to ASCAP for a list of the 400, 500 top-rated ASCAP tunes that are supposed to represent what the public wants in hearing, and we are hoping for a favorable reply.

Now what we would like to know is, what are the top-rated ASCAP tunes? And by knowing that we would like to find out if the public really recognizes them as music that it takes to its heart and loves.

For instance, why we no longer hear songs like "Macushla".

The Court: My goodness, you don't go to the right gatherings. In my county we have a fine Hebrew baritone that sings it at all the Jewish dinners.

Mr. Anderson: Well, that was just one tune. That happens to be my favorite tune. But there has been no way of ascertaining what the public interest is.

The Court: Well, really, Mr. Anderson, I don't think that what you have in mind, while I am most sympathetic to you—and I hope that you are not a publisher of these songs—

Mr. Anderson: I am not.

The Court: —that they get out and hand out at conventions [fol. 877] tions, that everybody sings together.

Mr. Anderson: No, I have nothing to do with publishing.

The Court: Really, what you have in mind is not before me, Mr. Anderson.

Mr. Anderson: How would we go about getting the information?

The Court: I can't answer that. You'd better get hold of Mr. Finkelstein and Mr. Dean. Maybe they can give you the information. However, there is some dispute as to what is a top-rated tune, you know. You have read about it in the newspapers, I assume.

Mr. Anderson: Yes.

The Court: And who rates them and why.

Mr. Anderson: That was the thing that we were interested in. We thought the public should be given an opportunity to hear these tunes and see if they can really identify them, or whether there is something that is being artificially induced through the various means at their disposal.

The Court: I suppose there is a little bit of artificial inducement in all business enterprises that have something to sell.

Mr. Anderson: We recognize that.

[fol. 878] The Court: Even toothpaste.

Mr. Anderson: Of course.

The Court: Glad to see you, Mr. Anderson, but really, what you have in mind is not a matter that is before me.

Mr. Anderson: I thank you for the privilege of saying a few words.

The Court: Well, I am glad to have you here.

Now does anybody else desire to be heard?

STATEMENT BY MR. DEAN

Mr. Dean: I will be very brief, your Honor.

I merely wanted to say that when I was first retained in this matter by recommendation of Mr. Finkelstein and Mr. Cutler, I had no previous acquaintance in my practice with the performing arts—I have had some experience with the antitrust field—and I had been listening to the problems and became convinced that there was a public service to be performed in trying to work out a consent decree here, if we could work it out, with the Government.

But in discussions with Mr. Finkelstein, Mr. Cutler and the Board of Directors, I also had the temerity to suggest that I might be free in the course of this to make sugges-

tions that I thought were in the public interest, and they agreed.

[fol. 879] I might say that I have studied this consent decree; I have understood its social consequences, and its effect upon the public.

We have had some 30-odd conferences with Mr. Bicks, Mr. Kilgore and Mr. Karsted, and John Wilson, who is in court here this morning, and there were pretty spirited exchanges, and since neither they nor we knew too much about how music was made, upon my recommendation the Board of Directors retained Joel Dean Associates, who, as I say, was no relation of mine but a very able and statistical organization in this field, and we have had the benefit of Joel Dean's advice continuously, and we have brought him down to these conferences with the Department of Justice, and we have conferred with, tried to study this situation and tried to represent all of the interests of all of the members of ASCAP.

Now, I think it is significant that with respect to each of the participating classes, both the writers and the publishers, that there has been a majority in each of the separate classes. I think that is very significant; that those having one vote, those having 2 to 5 or 6 to 25 or 26 to 50, 51 to 100, 101 to 250, and over 250, that in each of those [fol. 880] classes we had a majority, and the same is true with the publishers.

Now one of the things that the Department of Justice, of course, brought to our attention—there were dozens of others—and I might say that Mr. Wilson made himself a real expert in the field of the performing arts and on the subject of ASCAP, and was always exceptionally well-informed and very spirited in our conversations on this subject—was that they felt that there was too much money being given to the older writers or the older works, and that it was too difficult for a younger writer to become qualified, and that it was too difficult for an older writer's works to go down, and finally we worked out an amendment along those lines.

I naturally knew that that was going to be harsh on some of the widows or the children of song-writers who are de-

ceased, who are no longer creative, and it is interesting to me that even in that class we got a majority.

Now, when you are trying to work this out for the benefit of the younger writers, in an effort to encourage younger writers, or in an effort to encourage writers to stay in the songwriting profession, there being only so much [fol. 881] total money, naturally, that which you give to a younger writer comes from the older writer, and no matter how you work out these percentages, whatever you give to one class naturally has to come from another class.

I would say that the Department of Justice has fought very hard on this matter. We have done our level best to give them all of the information at our command, and I agree with your Honor, I don't say that this is the best decree that could be worked out under all possible circumstances, but I honestly don't believe—and I say this to Mr. Horsky, that I honestly don't believe that if we sat down and worked for another year, while we might change it in certain respects, that you could change this thing materially.

Well, the Department of Justice has got the right to come back within 18 months, and your Honor, as a chancery judge, always sort of keeps control of these proceedings, and I say to your Honor and I say to Mr. Horsky and all of the members of ASCAP, that I honestly believe that this is the best decree that we could work out under the circumstances, and I know that the Government joins with me in recommending that the court sign this proposed consent order.

[fol. 882] I honestly do not believe that if we sat down and worked on it for another six months or another year that while you might change it in some details, I don't believe you will change it in its fundamentals.

One more sentence and I am through. Mr. Rothstein said that ASCAP admitted that the voting procedure was inequitable. We do not admit that. We think that all things considered, that the voting procedures asked, as set forth in this consent order, is equitable, and I understand the Department of Justice, in approving this decree, goes along with us in that statement.

Thank you, your Honor.

The Court: Do you wish to be heard, Mr. O'Donnell?

STATEMENT BY MR. O'DONNELL.

Mr. O'Donnell: I think, your Honor, that it was sort of flash of genius on the part of the Court to call for a numerical counting of the votes.

The Court: I don't like to be called an inventor.

Mr. O'Donnell: That device has completely exploded that myth that we heard so much in October, that this proposed judgment did not represent the will of ASCAP but merely the will of the Board of Directors. I don't see how [fol. 883] any responsible person can ever urge that again after the results yesterday.

During the balloting, the only thing that disturbed me was something I read in the papers. I heard that there was some criticism of the fact that the President of ASCAP had put an improper pressure on the members by suggesting that dissolution might be around the corner if the new judgment was not brought into safe harbor. I think that he would have been guilty of a very shocking neglect of duty if he had not mentioned that possibility to the membership.

The Court: I think he reiterated the thoughts publicly expressed by the court.

Mr. O'Donnell: I think so.

The Court: I think the members of ASCAP were entitled to know, and that it was my duty to advise them of all the alternatives that had to be followed here.

Mr. O'Donnell: I think so, exactly.

Now, just as we did in October, we very strongly recommend that this proposed judgment be entered.

STATEMENT BY MR. ZISSU

Mr. Zissu: Your Honor, may I raise one point here? [fol. 884] The Court: Yes, sir. Your name, sir, so we have it on the record?

Mr. Zissu: Leonard Zissu, your Honor. I have appeared here before.

The Court: Yes.

Mr. Zissu: There may be some confusion with reference to your Honor's conception of the function of Judge McGeehan and Senator Ives and the proposed order of their appointment.

The proposed order relates their function purely to the technical aspects of the survey. In your Honor's colloquy with Mr. Horsky here, it seemed to me your Honor was talking about the experience and breadth of knowledge and recommendations that these men might make from the operation of the new plan, and your Honor was talking of something far broader than the mere technical survey.

The Court: Well, the order reads that they are appointed to examine periodically the design and conduct of the survey, that is, the basis of the distribution, and to make estimates of the accuracy of the samples, which is also the basis of the plan of distribution.

Mr. Zissu: Not necessarily, your Honor. The plan of distribution [fol. 885] may take into account your whole system of weighting formulas, which is not the survey problem at all.

The Court: Well, the weighting formulas are based in great measure on both the system that has been set up and the samples which are to be taken. This whole amended decree is predicated upon the results of the survey which was made. Now we want to see whether or not this survey works out fairly and justly, and whether or not it fulfills the purpose it was intended to fulfill, and that is the way I interpret this order. We might change it, change a word there and change a word here, and it would be a matter of verbiage.

Mr. Zissu: Well, it frankly is.

The Court: And these utterances which I make contemporaneously with the signing of this order are in the nature of what we judges sometimes refer to as contemporaneous writings, and they will be used to interpret and to apply the order in the scope of the duties and responsibilities of these men.

Mr. Zissu: Well, your Honor, because this may be very, very important to many parties concerned, it would seem to me from your Honor's conception that Judge McGeehan [fol. 886] and Senator Ives would be concerned with the distribution and weighting functions, too.

The Court: They will be, and that is what I intended to so provide by this order.

Mr. Zissu: Thank you.

The Court: They are going to give me a report on how this is working out.

Mr. Zissu: Thank you, sir.

STATEMENT BY MR. EASTMAN

Mr. Eastman: Your Honor, my name is Lee Eastman, I represent the Current Writers Committee.

The Court: Are you an attorney, Mr. Eastman?

Mr. Eastman: I beg your pardon?

The Court: Are you an attorney?

Mr. Eastman: Yes.

The Court: Excuse me. I simply want it on the record.

Mr. Eastman: I appeared before, your Honor.

The Court: I know you have.

Mr. Eastman: I hadn't intended to comment at all today but I do want to reply to remarks of Mr. Dean, when he stated that the Department and ASCAP negotiated to try and help the younger writer.

I represent the Current Writers Committee who, I believe, [fol. 887] have set forth in affidavit form increased evidence or statements of my own, in any event, that they represent at least 50 percent of the current activity in the nature of hits of ASCAP at the present time.

The writers prefer to go back to the old decree, your Honor; have protested greatly the present decree, and I would like to make it clear on the record that they vigorously oppose this present proposed amendment, and very much prefer as a lesser evil to go back to the old decree.

The suggestion of Mr. Dean that ASCAP aided the young writer is not reflected by the activities and the views of my clients, who are the active young writers of ASCAP.

The Court: Last evening I had an opportunity to make a few notes and I will now dictate my views upon the record, and it is my decision and factual findings in this matter.

I will appreciate it, Mr. Finkelstein, if you will order a copy of these remarks, which I now will dictate upon the record, so I may sign them as being my findings, and in the nature of an opinion.

.

[fol. 895] Anybody who wants to take an exception to the ruling may do so, although I don't think it is necessary.

COLLOQUY BETWEEN COURT AND COUNSEL

Mr. Dean: I don't wish to take any exception, your Honor. Might I just respectfully call your Honor's attention to the fact that since there aren't any fact issues in a consent decree proceeding, I assume that this will be entitled "Opinion" rather than "Findings."

[fol. 896] The Court: Well, it is a finding expressing an opinion on which there was no disputed fact. I find no factual dispute here. I simply have stated my findings to be simply the findings of what I read in the proposed decree.

Mr. Dean: Thank you, your Honor.

The Court: It is not a finding, in that it is intended in any way to be a factual finding of any disputed issues. There has been no trial here; there has been no testimony taken. I simply have set it forth, describing it as a finding, as being a statement of my reading of the decree.

Mr. Dean: Yes, sir. I just want to say one thing further, your Honor.

Of course your Honor understands that there has been no admissions here of the allegations in the complaint here by ASCAP, and that we do not subscribe to the Government's contention with respect to the propriety of the old procedures.

The Court: I understand that.

Mr. Dean: Yes.

The Court: This is not a decree that has been entered after contest; it is a consent decree within the meaning and the provision of the antitrust laws. There has been [fol. 897] no testimony, and, as is usual, there have been no factual findings as such.

Mr. Dean: I would like to thank your Honor for your patience. I would also like to thank Mr. O'Donnell and Mr. Bennett of the New York office of the Department of Justice for their cooperation. They have taken an enormous amount of time and overtime in this matter.

The Court: Well, I want to thank everybody, including the attorneys who appeared here as friends of the Court, and particularly I want to commend Jerome Golinko &

Company for again having carried out a trust which I have imposed. You have done so.

I have signed the three orders, and I will sign the decree.

[fol. 898]

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
Civil Action No. 13-95

UNITED STATES OF AMERICA,

Plaintiff,

—against—

AMERICAN SOCIETY OF COMPOSERS, AUTHORS
AND PUBLISHERS, et al.,

Defendants.

Court's Exhibit "A"

STATE OF NEW YORK)

ss.:

COUNTY OF NEW YORK)

AFFIDAVIT OF HERMAN FINKELSTEIN

HERMAN FINKELSTEIN, being duly sworn, deposes and says:

1. I am General Attorney for the American Society of Composers, Authors and Publishers (hereinafter referred to as "ASCAP"). Pursuant to the instructions of this Court in the proceedings herein on October 20, 1959 (pages 353-354 of minutes of those proceedings) and in accordance with the provisions of Annex A to the Court's Order dated November 27, 1959, I set up the procedure for, and supervised the preparation of and mailing of a ballot to each of ASCAP's members eligible to vote, upon which each of said members could indicate approval or disapproval of the proposed Consent Order further amending the Amended Final Judgment entered by this Court on March

14, 1950, and of the proposed amendments to ASCAP's Articles of Association.

2. The preparation of the ballots was conducted in complete accordance with the procedures set forth in Annex A to the order of this Court dated November 27, 1959.

[fol. 899] 3. The eligibility of members to vote and the number of votes assigned to members were determined as follows:

A. Writers

(1) All writer members, both participating and non-participating, who had executed their membership, radio and television agreements as of the close of business on November 24, 1959 were eligible to vote, except to the extent modified by paragraph (2) below.

(2) Successors of Deceased Composers and Authors:

In accordance with Article XX of ASCAP's Articles of Association, only those successors to the membership of deceased composers and authors who are related to the deceased member in the capacity of widow, widower, child, children, brother(s) or sister(s) were eligible to vote.

(3) The number of votes accorded to each writer member eligible to vote was determined in accordance with the following formula, which is set forth in Article IV, Section 4(h) of ASCAP's Articles of Association:

One (1) vote for each \$20 or major fraction thereof received during the previous calendar year as participation in the Society's distributions of domestic royalties excluding all sums received as prize awards, each writer member eligible to vote being entitled to not less than one vote.

[fol. 900] B. *Publishers*:

(1) All publisher members who had executed their membership, radio and television agreements as of the close of business on November 24, 1959 were eligible to vote.

(2) The number of votes accorded to each publisher member eligible to vote was determined in accordance with the following formula, which is set forth in Article IV, Section 4(h) of ASCAP's Articles of Association:

One (1) vote for each \$500 or major portion thereof received during the previous calendar year as participation in the Society's distributions of domestic royalties, each publisher member eligible to vote being entitled to no less than one vote.

4: At my direction, two voting lists were prepared—one for writer members and one for publisher members—setting forth thereon all members eligible to vote on the above-described basis. I then turned over such lists to Aaron A. Mappen, a senior member of the firm of Jerome I. Golinko & Company.

5. In accordance with my instructions, the envelopes in which the ballots were to be forwarded were addressed to the last known address of each member as of the close of the November 27, 1959 business day.

[fol. 901] 6. I instructed Robert Turner and Eric Leisen, who are employees of ASCAP, to insert the following material, and no other documents or material, in envelopes that were addressed to all ASCAP members eligible to vote:

(a) the proposed Consent Order (a copy of which is annexed hereto as Exhibit "A");

(b) the proposed amendments to the Articles of Association (a copy of which annexed hereto as Exhibit "B");

(c) a letter dated November 29, 1959, signed by Stanley Adams, President of ASCAP (a copy of which is annexed hereto as Exhibit "C");

(d) a ballot upon which the ballot number was stamped and upon which was written the member's number of votes as determined in accordance with the formula and procedure set forth above (copies of the form of ballot sent to the publisher and writer members are annexed hereto as Exhibits "D" and "E"; and

(e) a pre-paid stamped envelope, special delivery, first class, with the member's ballot number stamped on it, addressed to:

Herman Finkelstein, General Attorney
American Society of Composers, Authors and
Publishers

P. O. Box 2578

Grand Central Station, New York 17, New York

(a form of which is annexed hereto as Exhibit "F").

[fol. 902] 7. Pursuant to my instructions, after the ballots and other material had been inserted in the appropriate envelopes, as described in the affidavit of Robert Turner dated December 15, 1959, annexed hereto, they were turned over to Mr. Mappen.

8. The mailing of the ballots were directly supervised by Mr. Mappen as described in his affidavit dated December 15, 1959, annexed hereto.

/s/ HERMAN FINKELSTEIN

Sworn to before me this
15th day of December, 1959.

HENRY HÖFSCHUSTER

Notary Public, State of New York

No. 03-6934300

Qualified in Bronx County

Certificate filed in New York County

Commission Expires March 30, 1960

[fol. 903]

CLERK'S NOTE

In order to avoid duplication of printing, it would be satisfactory if, instead of printing Exhibits A and B in their entirety:

(a) The cover page of Exhibit A to the Affidavit of Herman Finkelstein were printed preceded by the following statement:

"This booklet comprises the proposed consent-further amended Final Judgment, together with Attachments A, B and C and the Writers' Distribution Formula and Weighting Formula referred to therein. These documents, as amended by the Consent and Order entered January 7, 1960 (which is printed elsewhere in this Record), are substantially identical to the Consent Further Amended Final Judgment entered January 7, 1960, which is printed elsewhere in this Record."

(b) The following statement is printed in lieu of printing Exhibit B:

"Exhibit B, a booklet To All Members of the Society dated November 4, 1959, containing the proposed amendments to the Society's Articles of Association, is printed elsewhere in this Record."

[fol. 904]

AMERICAN SOCIETY OF COMPOSERS,
AUTHORS AND PUBLISHERS

575 Madison Avenue
New York 22, New York

November 29, 1959

This booklet contains:

1. The proposed Consent Order, consented to by the Government and by the Society, further amending the Amended Final Judgment entered on March 14, 1950, in *United States of America v. American Society of Composers, Authors and Publishers* (the existing Con-

Vincent Lopez
HOTEL TAFT
NEW YORK 19, N. Y.

URGENT NOTICE

DEAR FELLOW ASCAP MEMBER:

Save this letter for at least 30 days! It is the key to your future welfare.

I have never made a plea like this before, but within the next month ASCAP is going to ask you to vote for or **AGAINST** the proposed Consent Decree.

The importance of this has so much to do with the security of most members that I must urge you to review the contents of this Decree. It will adversely affect and shorten your security and that of your wife, children, widow or heirs. This was admitted to Judge Ryan in court by the very lawyers responsible for the new Decree.

Because this decree will take away the future security you have planned and contracted for in our fine organization, I implore you to exercise your right by joining me and thousands of your fellow members and vote **AGAINST**

AGAINST

AGAINST

the proposed Consent Decree.

Sincerely,

Vincent Lopez

VINCENT LOPEZ

P.S. After your careful deliberation please fill in the enclosed card and return at the earliest moment.

sent Decree). The proposed amendments to the Consent Judgment include Attachments A, B, and C.

2. The proposed Writers' Distribution Formula.
3. The proposed Weighting Formula.

The proposed Writers' Distribution Formula and the proposed Weighting Formula are not part of the proposed amendments to the Consent Judgment. These documents represent the formulas which the Society would initially put into effect, and the Government has agreed that these formulas initially comply with the provisions of the proposed amendments to the Consent Judgment. They may not be amended without thirty days' prior written notice to the Department of Justice and, of course, any amendments would also have to comply with the provisions of the proposed amendments to the Consent Judgment.

When the proposed amendments to the Consent Judgment were drafted, it was hoped that they could be made effective on or about October 1, 1959. Accordingly, there are several references in the proposed amendments to the Consent Judgment, in the Attachments thereto, and in the Writers' Distribution Formula and the Weighting Formula, to the dates September 30, 1959 or October 1, 1959, as the time when various provisions would go into effect.

At the hearings before Chief Judge Ryan on October 19-20, 1959, he was advised that, in view of the passage of time, counsel for the Society and for the Department of Justice have agreed that they would jointly review all of the dates set forth in the attached documents, and that ASCAP and the Department would then join in asking the Court to substitute, where appropriate, new starting dates—which would be as early as possible under the circumstances—for those appearing in the attached documents.

[fol. 905]

EXHIBIT "C"

Murray Hill 8-8800 Cable Address: ASCAP, New York

AMERICAN SOCIETY OF COMPOSERS,
AUTHORS AND PUBLISHERS575 Madison Avenue
New York 22, New York

November 29, 1959

To All Members: VOTE!SUBJECT: Proposed Amendments to Consent
Judgment; Proposed Amendments
to Articles of Association

Enclosed is a ballot to vote on the proposed Consent Order further amending the Amended Final Judgment entered on March 14, 1950, in *United States of America v. American Society of Composers, Authors and Publishers* (the existing Consent Decree) and the proposed Amendments to the Society's Articles of Association which the Society must adopt before it can finally consent to said proposed Amendments to the Consent Judgment.

A vote in the box on the ballot designated "YES" will be a vote in favor of approving the proposed Amendments to the Consent Judgment, and consequently a vote to adopt the proposed Amendments to the Society's Articles of Association.

A vote in the box on the ballot designated "NO" will be a vote against approving the proposed Amendments to the Consent Judgment, and consequently a vote against adoption of the proposed Amendments to the Society's Articles of Association.

All votes will be tabulated according to the Society's present Articles of Association, pursuant to which each member has the number of votes appearing on his ballot.

For the information of Chief Judge Sylvester J. Ryan of the United States District Court for the Southern District of New York as to the number of members voting for and against the proposed Amendments to the Consent Judgment, the votes will also be tabulated on a numerical basis. However, for purposes of determining whether the proposed Amendments to the Articles of Association have been adopted in accordance with the provisions of the Articles of Association, only the weighted vote will be considered.

The Board of Directors has unanimously recommended approval of the proposed Amendments to the Consent Judgment.

[fol. 905a] The resolution for the proposed Amendments to the Articles of Association was duly presented to the Board of Directors at its meeting on November 2, 1959 and was also brought before a Special Meeting of the Society on November 24, 1959, together with the proposed Amendments to the Consent Judgment.

It is important that every member vote on the proposed Amendments to the Consent Judgment and on the proposed Amendments to the Articles of Association.

The Articles of Association require that, for an amendment to be adopted, an affirmative vote (weighted in accordance with the Articles of Association) is required of two-thirds of the combined average of writer and publisher votes eligible to be cast.

Please return your ballot in the enclosed postage-prepaid envelope in time to be received not later than midnight, December 19, 1959, or the ballot may be delivered in person or by messenger before such closing hour to 575 Madison Avenue, New York, N. Y., addressed to the attention of Herman Finkelstein, Esq., General Attorney for the Society, who has been designated by the Court to receive these ballots.

Any ballot that is not signed, or is not delivered before the time indicated, cannot be counted.

The following documents are also enclosed:

1. The proposed Amendments to the Consent Judgment to be voted upon. This is prefaced by a brief explanatory statement.

2. An additional copy of the letter of November 4, 1959 containing the proposed Amendments to the Articles of Association. This is also prefaced by a brief explanatory statement.

Please read these documents carefully, and then be sure to sign your ballot and mail in your vote.

The privilege of voting carries with it the obligation to cast your ballot. Please do so without fail.

Sincerely yours,

AMERICAN SOCIETY OF COMPOSERS,
AUTHORS AND PUBLISHERS

STANLEY ADAMS,
President.

[fol. 906]

EXHIBIT "D"

BE SURE

TO SIGN THIS SLIP
ON THE OTHER SIDE

DO NOT DETACH

BALLOT

VOTES

NAME OF FILM:

SIGNATURE OF REPRESENTATIVE:

Do not detach or fold down stub

↑
This Ballot must
be signed above.



OFFICIAL BALLOT

Emblem) OF (Emblem)

AMERICAN SOCIETY OF COMPOSERS,
AUTHORS AND PUBLISHERS

ON THE PROPOSED CONSENT ORDER further amend-
ing the 1950 ASCAP Consent Decree and Judgment, and
ON THE PROPOSED AMENDMENTS to the Articles of
Association,

I vote:

YES ☐

NO ☐

Mark an "X" in the appropriate box.

A vote "YES" is a vote in favor of approving the proposed amendments to the Consent Judgment. It is also a vote to adopt the Amendments to the Articles of Association.

A vote "NO" is a vote against approving the proposed amendments to the Consent Judgment. It is also a vote against adoption of the Amendments to the Articles of Association.

INSTRUCTIONS FOR VOTING

Be sure to sign the ballot on the above detachable stub. **UNSIGNED BALLOTS WILL NOT BE COUNTED.** Do not detach or fold down stub. Mail only in the attached, postage-prepaid envelope or deliver in person to 575 Madison Avenue, New York, N. Y., addressed to the attention of Herman Finkelstein, Esq., General Attorney for the Society. All ballots must be received by midnight on December 19, 1959.

[Reverse side]

**OFFICIAL BALLOT
MUST BE RECEIVED
BEFORE MIDNIGHT
DECEMBER 19, 1959**

[fol. 907]

EXHIBIT "E"

BE SURE

TO SIGN THIS SLIP
ON THE OTHER SIDE

DO NOT DETACH

BALLOT

VOTES

SIGNATURE OF MEMBER:

Do not detach or fold down stub

↑
This Ballot must
be signed above.



OFFICIAL BALLOT

(Emblem)

OF

(Emblem)

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AUTHORS AND PUBLISHERS

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ing the 1950 ASCAP Consent Decree and Judgment, and
ON THE PROPOSED AMENDMENTS to the Articles of
Association,

I vote:

YES ☐

NO ☐

Mark an "X" in the appropriate box.

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[Reverse side]

OFFICIAL BALLOT
MUST BE RECEIVED
BEFORE MIDNIGHT
DECEMBER 19, 1959

[fol. 917]

Court's Exhibit "D"

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
Civil Action No. 13-95

UNITED STATES OF AMERICA, Plaintiff,

—against—

AMERICAN SOCIETY OF COMPOSERS, AUTHORS
AND PUBLISHERS, et al., Defendants.

State of New York,
County of New York, ss.:

AFFIDAVIT OF HERMAN FINKELSTEIN

HERMAN FINKELSTEIN, being duly sworn, deposes and says:

1. I am General Attorney for the American Society of Composers, Authors and Publishers (hereinafter referred to as the "Society"). This affidavit is made pursuant to the instructions of this Court at the hearing held herein on October 20, 1959 (pages 355-361 of the minutes of those proceedings), and covers my supervision of mailing of certain letters on behalf of members of the Society. There are annexed hereto affidavits of mailing dated January 5, 1960 by Anne G. Feldman, an attorney in the Society's Legal Department, and by Robert Turner and Arnold Saemann, who are employed in the Society's mail room.

2. Requests to the Society to mail letters to the entire membership commenting on the proposed Consent Order further amending the Amended Final Judgment of March 14, 1950, were made by or on behalf of the following members of the Society:

(1) Barney Young, on behalf of Vincent Lopez, requested the mailing of certain documents, copies of which are annexed hereto as Exhibits "A-1" and "A-2";

[fol. 918] (2) Herbert Cheyette, Esq., who purported to speak

(a) For himself and Charles Horsky, Esq., as attorneys for Sam Fox Publishing Company, Inc., Movietone Music Corp., Pleasant Music Publishing Corp., Jefferson Music Co., Inc.;

(b) For Arthur Fishbein, Esq., as attorney for Charles K. Harris Music Publishing Co., Inc., Southern Music Publishing Co., Inc., LaSalle Music Publishers, Inc., RFD Music Publishing Co., Inc., Panther Music Corporation;

(c) For Sidney Rothstein, Esq., as attorney for Gem Music Corporation, Denton & Haskins Corporation, Barney Young;

(d) For Bernard Kaufman, Esq., as attorney for Lewis Bellin;

(e) For Lee V. Eastman, Esq., as attorney for 58 writer members whose names are annexed hereto as Exhibit "B", and

(f) For the following members who had appeared in the proceedings herein on October 19 and 20, 1959 in their own behalf:

Edgar Battle,
Perry Bradford,
Robert Davis,
Guy Freedman;

requested the mailing of certain documents, copies of which are annexed hereto as Exhibits "C-1" and "C-2".

(3) The members listed in Exhibit "B", annexed hereto, who were represented by Mr. Eastman, requested an additional mailing of certain documents, copies of which are annexed hereto as Exhibits "D-1" and "D-2";

(4) Hans J. Lengsfelder requested a mailing of certain documents, copies of which are annexed hereto as Exhibits "E-1", "E-2", and "E-3".

(5) The Sam Fox Publishing Company, Inc., requested an additional mailing of a certain document, a copy of which is annexed hereto as Exhibit "F".

[fol. 919] (6) Abel Baer, speaking for himself and 43 other members whose names are annexed hereto as Exhibit "G", requested the mailing of a certain document, a copy of which is annexed hereto as Exhibit "H".

(7) Otto A. Harbach requested the mailing of a certain document, a copy of which is annexed hereto as Exhibit "I".

(8) May Singhi Breen De Rose requested the mailing of a certain document, a copy of which is annexed hereto as Exhibit "J".

3. I, or in my absence, attorneys in the Society's Legal Department acting in accordance with my instructions, advised the persons above described that the material annexed hereto as Exhibits "A-1", "A-2", "C-1" through "F", and "H" through "J", would be mailed by the Society on their behalf and that such persons would be permitted to have representatives present at the Society's offices while the addressing, inserting and mailing of such material took place. The affidavits of Anne G. Feldman, Robert Turner and Arnold Saemann, annexed hereto, set forth the names of the persons who were present at such mailings as representatives of the persons above described.

4. Pursuant to the instructions of Stanley Adams, President of the Society, certain documents, copies of which are annexed hereto as Exhibits "K", "L" and "M", were mailed to all members of the Society and certain documents, copies of which are annexed hereto as Exhibit "N-1" and "N-2", were mailed to all writer members of the Society.

5. On December 11, 1959, I directed that the document annexed hereto as Exhibit "O" be mailed to all members whose ballots had not yet been received. I asked Aaron

A. Mappen of the firm of Jerome I. Golinko & Co., whose [fol. 920] affidavit dated January 5, 1960, is annexed hereto, to show Robert Turner, and no other person employed by or connected with the Society, a list of the members whose ballots had not been received.

6. It was agreed during the hearings herein on October 20, 1959 (minutes, pages 358-360) that the Society would pay \$1,000 toward the expenses of a single mailing to the members of the Society by all those who appeared, in person or by counsel, in opposition to the entry of the proposed Consent Order. Such a mailing was made. (Exhibits "C-1" and "C-2" hereto). The Society paid \$279.44 for postage for this mailing. Pursuant to the direction of Herbert Chevette, Esq., the remaining \$720.56 of said \$1,000 was paid by the Society by a check to Sidney Rothstein, Esq. A copy of the letter accompanying that check is annexed hereto as Exhibit "P".

Herman Finkelstein

Sworn to before me this
5th day of January, 1960.

HENRY HOFSCHUSTER
Notary Public

HENRY HOFSCHUSTER
Notary Public, State of New York
No. 03-6934300
Qualified in Bronx County
Certificate filed in New York County
Commission Expires March 30, 1960

OUR 25th ANNIVERSARY

Members for a Fair ASCAP

Representing a majority of the groups that appeared before Judge Ryan on October 19th, in addition to those many writers and publishers, great and small, who have taken heart and joined us since then

DEAR FELLOW MEMBER OF ASCAP:

ASCAP BELONGS TO YOU...VOTE FOR YOUR RIGHTS! Vote NO ON THE PROPOSED AMENDMENT!

Who dreamed up the proposed amendment? You were *never* consulted about it! It does not represent *your* needs. Only the ruling group will profit by having it passed... because it will keep them in control by continuing to deny *you* and the majority of members a proper voice in ASCAP!

No wonder Judge Ryan, who must pass on the amendment, said he saw "no consent in this Consent Decree." Therefore... **vote NO... NO CONSENT!**

**THE PROPOSED AMENDMENT
TO OUR CONSENT DECREE
PERPETUATES THE INJUSTICES
AND INEQUITIES OF PAST YEARS.
A "NO" VOTE, NOW,
IS IN YOUR BEST INTERESTS!**

THIS IS THE FIRST TIME YOUR VOTE REALLY COUNTS!... VOTE NO!

Vote NO... this time you cannot be crushed by weighted votes! Judge Ryan has arranged for votes to be tallied on a "one member... one vote" basis, as well! ASCAP, in order to survive, must (in the words of Judge Ryan) "clean its own house." Therefore vote NO and get the "clean-up" started!

HERE'S WHAT A "NO" VOTE CAN DO!

- 1 End the control of ASCAP by a power-hungry, self-perpetuating few!
- 1 Force a simple, fair distribution of ASCAP "performance rights" earnings!
- 1 Stop favoritism that arbitrarily "ups" and "downs" songs!
- 1 Eliminate the penalty against the "current songs"!

A "NO" VOTE MEANS THE BEGINNING OF A BETTER ASCAP... NOT THE END OF ASCAP!

A "NO" vote will *not* cause the dissolution of ASCAP! The administration would not have tried to force through the same old injustices if they had the slightest fear of dissolution. (*They would not have dared to jeopardize their yearly millions... they have the most to lose!*)

DON'T FALL FOR THE BLUFF OF THREATENED RESIGNATIONS

- ★ Warner Bros. left in 1935 and *had* to come back in 1936
- ★ In 1941 the networks and BMI combined could not keep ASCAP off the air
- ★ The public demands ASCAP music, and the government will see that they get it
- ★ Who should anyone want to resign from a *clean* ASCAP? All we want is fair treatment for everyone, from the biggest to the smallest.

COMMITTEE OF —

Members for a *Fair* ASCAP

Want the facts—

that ASCAP's
ruling officials
haven't
given
to you?

Look at what Judge Ryan,
Congress, and the
Justice Dept. have to say →

Here are some of the Official Statements:

JUDGE RYAN, COMMENTING ON THE HEARING, SAID TO ARTHUR DEAN, ASCAP COUNSEL

"I have been impressed by them. They have shown weaknesses in your organization; they have shown some weaknesses in the administration."

ROOSEVELT COMMITTEE STAFF ANALYSIS OF THE AMENDMENT

"It is essential, however, that the powers of the 'ruling clique' be diluted."

With reference to the proposed amendment to the distribution formula:

"It appears doubtful that it will bring the necessary degree of help."

With reference to the grievance procedures:

"It is in this area, particularly, that the ruling clique within ASCAP appears to have demonstrated a feeling of indifference toward the welfare of the smaller publisher and composer members."

"In any event it is necessary that the ruling officials of the Society be made to realize that they are the servants of the members, not their masters."

CONGRESSMAN PHILIP J. PHILBIN (MASS.)

"I am very friendly disposed toward the great music industry. I am eager to see it prosper and grow in every legitimate way. But in view of many evidences of gross abuses, flagrant injustices, ruthless methods and monopolistic patterns, I am again urging its leadership to clean house and banish those unjust practices of its own motion before the Congress is constrained to apply drastic remedies that may

occasion more or less rigid control of activities that are violative of good conscience and equity, and contrary to public interest."

JUSTICE DEPARTMENT'S MEMORANDUM —

ASCAP's local survey is *inaccurate and inefficient*."

Referring to background music credits:

"Such rules put certain members of the Society at a tremendous competitive disadvantage."

"The Board has complete control of the affairs of the Society... it is self-perpetuating."

Referring to the weighted vote

"It is impossible that true representation can be given on the Board of Directors to members with different participation in the ASCAP revenues."

Referring to the rules of distribution

"The vice of the system is that it gives those members in ASCAP who receive the largest share of ASCAP's revenues the power to elect the directors of the Society, who, in turn, have the power to establish the rules governing the Society's system of distribution, which, in turn, determines which members shall receive the largest share of the Society's income."

"The members have nothing to say about the enactment or promulgation."

"Thus, it is apparent that ASCAP's appellate machinery has been made so complex, cumbersome, dilatory and expensive as to effectively deny its members the right of appeal to an impartial board."

YOUR

COMPOSERS
Writers

YOUR COMMITTEE OF

Members for a
Fair ASCAP

Vote NO!

against the proposed amendment
to the consent decree, and –

**PROTECT
YOUR FUTURE
IN
ASCAP!**

Here's the real story →

IN A SHORT TIME, YOU WILL BE ASKED TO VOTE ON A NEW ASCAP CONSENT DECREE...

question is...

- IS IT YOUR DECREE? • DID YOU CONSENT?
- WERE YOU THERE AT THE NEGOTIATIONS?
- WERE YOUR NEEDS CONSIDERED?
- WERE YOUR INTERESTS REPRESENTED?

IF YOU ARE NOT A MEMBER OF THE BOARD OR ONE OF THE FEW FAVORED INS, the answer to all the questions has to be NO!

A vote of "NO" to the new consent decree will be the first step toward guaranteeing a fair share for all members!

Let us consider what caused the present critical situation in ASCAP. Certain groups of members, both publishers and writers, went to Congress and the Justice Department for redress of what they felt were wrongs done them by the rulings of the ASCAP Board. They all had one thing in common: They knew from experience that the Board would do nothing for them. THEY WENT BECAUSE THEY KNEW THEY HAD NO OTHER CHOICE! The action of the ROOSEVELT SMALL BUSINESS COMMITTEE and the JUSTICE DEPARTMENT proved that there was justice in their claims. The order came down to ASCAP: CLEAN HOUSE!

WHAT WAS THE BOARD'S REACTION? Did they sit down in a spirit of give and take to iron out differences? NO. They girded their loins for battle, hired top grade legal counsel for enormous sums of YOUR money and set out to keep their position of entrenched power intact. Did these new lawyers spend five minutes with the different groups to find out where justice really lay? They did not. They were not hired for this purpose. They were hired to preserve the powers of the entrenched few; to yield, if necessary, power reluctantly with one hand and grab even more with the other. Indeed, these new lawyers were shielded from the complaints of the membership they were hired to serve.

Now, what was the plan of battle of the entrenched powers?

1. TO HAMMER OUT THE BEST DECREE THEY COULD GET FOR THEMSELVES FROM THE JUSTICE DEPARTMENT.
2. TO GET APPROVAL FROM JUDGE RYAN.
3. Then, and only then, GO TO THE MEMBERSHIP WITH AN ALREADY APPROVED DECREE.

They were going to let you vote after the decision was made!!!

BUT Judge Ryan did not see it that way. Judge Ryan said, and these are his words:

"I SEE NO CONSENT IN THIS
CONSENT DECREE."

So, the Judge ordered the Decree submitted to the membership now, not later. He wanted to know the true will of the Society.

Members of ASCAP, Judge Ryan has given us a life. We cannot afford to toss it away.

What we want is what should have happened in the first place, a consent decree which will contain equity for all.

We want an end to the constant strife which has torn at the guts of the Society for so long. There is only one way to end this strife, and that is to end the injustices imposed upon us by a willful few!

In order to get your vote the Board will threaten you with many bogymen. Why? Who will penalize us because we want a hand in the formation of the Consent Decree of our own Society? Isn't this what the Justice Department wanted in the first place? No one can be harmed by a fair decree!

Join us and get a Decree in which YOUR interests will be fairly represented.

VOTE NO TO THE PROPOSED AMENDMENT!

The real strength of the entrenched minority has always been their ability to divide the membership. Don't let this happen again. This is your first real chance to make your vote count.

VOTE NO TO THE PROPOSED AMENDMENT!

Don't be frightened! We cannot be harmed if we act fairly and honestly. VOTE NO TO THE NEW PROPOSED AMENDMENT AND YOU WILL BE GETTING YES TO A NEW ERA IN ASCAP.

We take no joy in the struggle which is now raging in the Society. We do not wish any victories, only peace and understanding. We ask the Board to give up the arrogance and contempt with which they have treated the bulk of the membership.

With utter sincerity we urge all groups to sit down in a spirit of compromise and good will. You will find in us no intransigence, no ill will, only a desire to live and let live. Indeed, we must learn to live with each other in a spirit of harmony for ASCAP to flourish and grow.

Vote NO! ASCAP's future depends on you!

Vote NO!

...and INCREASE YOUR EARNINGS!

Vote NO!

...and PUT ASCAP back in the music!

Vote NO!

...and PROTECT the provisions of YOUR CHARTER!

Vote NO!

...and PREVENT ASCAP from being controlled by a few!

Vote NO!

...and END the control of ASCAP by a few!

IN YOUR OWN INTERESTS for a democratic
the majority & **Vote NO** against the

D's future depends on You!

R EARNINGS!

.....

work in the music business!

.....

provisions of YOUR security rights!

.....

P from being dissolved!

.....

of ASCAP by a self-perpetuating few!

.....

**STTS for a democratic ASCAP, join with
NO against the new amendment!**

"THERE WILL ALWAYS BE AN ASCAP"

November 19, 1959

Dear Fellow members of ASCAP,

"It is not the intent or to the best interest of the U.S. Government to dissolve ASCAP." **DON'T BE LED ASTRAY!!**

You will soon receive a ballot from ASCAP. If you vote "YES" to these Articles of Association, you are voting to APPROVE the proposed consent decree. If you vote "NO", you are voting to DEFEAT the decree.

VOTE NO!

A VOTE AGAINST THE DECREE DOES NOT CONSTITUTE A THREAT TO THE SOCIETY!!!

WHO SAYS SO?

CONGRESSMAN JAMES ROOSEVELT IN THE ENCLOSED ARTICLE!!!
READ IT NOW!!!

In the new distribution plan in the consent decree there is a GIMMICK called RECOGNIZED WORKS. THIS WILL ROB YOU OF 30% OF YOUR CURRENT ASCAP INCOME. CAN YOU AFFORD IT?

A \$5,000 income will be cut to \$3,500

A \$3,000 income will be cut to \$2,100

A \$2,000 income will be cut to \$1,400

A \$1,000 income will be cut to \$700... et cetera.

WHAT A PICNIC THIS WOULD BE FOR B.M.I.!

ASCAP is a GIANT! The great old songs are its MUSCLE. The new songs are its FOOD.

B.M.I. is a GIANT. New songs are ITS MUSCLE and ITS FOOD.

STARVE AND DISCOURAGE THE NEW AND
ACTIVE WRITER OF ASCAP AND YOU FEED THE
B.M.I. GIANT!!

A CUT OF 30% IN HIS CURRENT INCOME KILLS
THE ACTIVE AND NEW WRITER.

KILL THE ACTIVE WRITER AND
YOU KILL ASCAP!

Common sense tells you ASCAP must think of TO-
MORROW as well as TODAY. Vote against the articles
of association! Remember, they look innocent in them-
selves, but if you accept them, you accept the LOADED
consent decree.

VOTE "NO" "NO" "NO" to EVERYTHING and save
ASCAP and YOUR FAMILY'S SECURITY.

Sincerely yours,

THE CURRENT WRITERS COMMITTEE

★ Warner Bros. left in 1935 and *had*
to come back in 1936

★ In 1941 the networks and BMI combined
could not keep ASCAP on the air

★ The public demands ASCAP music, and the
government will see that they get it.

★ Why should anyone *want to resign* from a *clean*
ASCAP? all we want is fair treatment for
everyone from the biggest to the smallest.

A "NO" vote *will* accomplish the Roosevelt Committee's objective: "that the ruling officials
of the Society be made to realize that they are the servants of the members, not their masters."

Vote NO AND WIN THE RIGHTS TO A PROPER VOICE IN A TRULY DEMOCRATIC ASCAP!
ASCAP'S FUTURE DEPENDS ON YOU!

[fol. 928]

EXHIBIT "E-1"

H. J. LENGSEFELDER
27 MONTROSE RD.
SCARSDALE, N. Y.

Dear Fellow Member:

Having read the recent pamphlet from ASCAP, let us discuss the important facts in the battle now raging within the Society.

TO ALL MEMBERS of whatever persuasion, this plea is addressed in the strongest terms:

THE NEW CONSENT DECREE MUST BE
DEFEATED!

Those who for obvious reasons try to force its passage, have resorted to the use of FEAR to influence our decision. No where do they say this is a fair and democratic decree. Instead they threaten possible dissolution. This is a false threat, and facts will prove it so.

My convictions come from my many contacts with legislators and government officials. They have unanimously and unqualifiedly stated that the existence of ASCAP is a MUST, but that it is equally a MUST that the Society be run *honestly and fairly*.

The present ASCAP Board tries to create the false impression that the new Decree is *all* that the Government wanted. However government lawyers stated in court that the proposed Decree is the *most* that could be obtained from the Board of ASCAP.

The lawyers hired by the Board fought desperately for this Board to retain its control of the Society. The Decree was negotiated behind our backs and our Board did not even plan to let us vote on the Decree! It was only Judge Ryan's last-minute decision which now gives us this privilege. IF IN THE FUTURE YOU WANT A VOICE IN OUR SOCIETY'S AFFAIRS, VOTE "NO".

The Government investigations have proven that the Society is being run by the few giant publishers on the Board

(An irate and critical writer member of the very same Board called them openly the "Powerhouse"). Said the recent Government memorandum to the U. S. District Court, page 24:

"Less than 1% of the publishers have the voting power to elect all twelve of the publisher directors, and less than 5% of the writer members can elect all the writer members."

Remember if there were the slightest threat of dissolution, the Board would never have acted so arrogantly and dictatorially, thus creating the current struggle. For many years, even during the recent negotiations with the Government, I kept pleading in vain with our Board to call in members with different interests to discuss and iron out the inequities in our system. Copies of these many letters are available to any member. Instead, the Board ignored all pleas and therefore must take the full responsibility for bringing about the present situation.

Now let us cut through the hysteria and panic whipped up by the Board and consider calmly the various possibilities, should the membership vote "NO" to the Decree.

1. Judge Ryan might persuade the Board to sit down with all members to work out a better and more democratic decree.

[fol. 928a] 2. Judge Ryan might refuse to sign the Decree and refer the case back to the Justice Department. Then our Board can either negotiate a new decree with the Justice Department, a new decree acceptable to all members, or defy the membership and our Government, refusing to give up its position of dominance.

3. Should the ruling minority in ASCAP refuse all compromise, the Justice Department might be forced to litigate. **BUT THIS LITIGATION CAN ONLY CONCERN THE UNFAIR PRACTICES WITHIN THE SOCIETY!** Such litigation can prove disastrous for the Board, not for the Society.

We, whose livelihood depends on the welfare of ASCAP, must: **VOTE NO TO THE NEW CONSENT DECREE.**

Then let us all sit down in a spirit of "live and let live" to work out a decree for the good of all.

THE MEMBERSHIP IS ENTITLED TO:

1. Voting that will prevent any one group from controlling the lives and destinies of all.
2. Unbiased logging which will cost less and not leave most of our earnings up to chance.
3. Distribution on the same basis for all, old and new songs alike, with USAGE the only measuring rod for payment.
4. Security for writers, but on a fair and unbiased basis. In other words . . . THE SAME SECURITY FOR ALL.
5. Simple rules (with no possibility of different interpretations) so that anyone can understand the workings of the Society.

THIS CAN BE DONE!—SOCIETIES ALL OVER THE WORLD HAVE IT!

Then, with a united membership and a clean, respected Society, we can forget our differences and strive for badly-needed improvements OUTSIDE the Society, such as copy-right laws, the Juke Box payments, and others.

Now, as to the members who have joined our Society since 1941—do not be afraid to join us in our fight for a better and fairer ASCAP. Remember that if it were not for the determined opposition in ASCAP, you would have no Society to worry about because YOU WOULD NEVER HAVE BEEN ALLOWED IN! It was our fight, with "blood, sweat and tears" which caused our Government to give you the right to become members. Now that you are members, join us in our efforts to make it a fair society for all writers and publishers of yesterday, today, and tomorrow.

Cordially yours,

/s/ LENGSFELDER
H. J. Lengsfelder

P. S. I would appreciate receiving your ideas about this important matter. Enclosed is a postcard for your convenience.

[fol. 931]

EXHIBIT "F"

1. The publishers need the writers and the writers need the publishers, and we both need a fair and honest ASCAP. Now the Society is run by a small group of major publishers who act as if they need no one but themselves.
2. Would we as a big publisher with no BMI affiliate risk bankruptcy by voting NO if we thought there was a chance of ASCAP being dissolved?
3. For the first time in the history of ASCAP your ballot is SECRET and your ballot COUNTS. VOTE NO!

SAM FOX PUBLISHING COMPANY, INC.**/s/ FREDERICK FOX**

a vote against the decree
does NOT endanger ASCAP!

THE BILLBOARD

NOVEMBER 16, 1959

EXHIBIT "E-1"

H. J. LENGSELDER

27 MONTROSE RD.

SCARSDALE, N. Y.

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2. Unbiased logging which will cost less and not leave most of our earnings up to chance.
3. Distribution on the same basis for all; old and new songs alike, with USAGE the only measuring rod for payment.
4. Security for writers, but on a fair and unbiased basis. In other words . . . **THE SAME SECURITY FOR ALL.**
5. Simple rules (with no possibility of different interpretations) so that anyone can understand the workings of the Society.

THIS CAN BE DONE!—SOCIETIES ALL OVER THE WORLD HAVE IT!

Then, with a united membership and a clean, respected Society, we can forget our differences and strive for badly-needed improvements **OUTSIDE** the Society, such as copyright laws, the Juke Box payments, and others.

Now, as to the members who have joined our Society since 1941—do not be afraid to join us in our fight for a better and fairer ASCAP. Remember that if it were not for the determined opposition in ASCAP, you would have no Society to worry about because **YOU WOULD NEVER HAVE BEEN ALLOWED IN!** It was our fight, with "blood, sweat and tears" which caused our Government to give you the right to become members. Now that you are members, join us in our efforts to make it a fair society for all writers and publishers of yesterday, today, and tomorrow.

Cordially yours,

/s/ LENGSFELDER
H. J. Lengsfelder

P. S. I would appreciate receiving your ideas about this important matter. Enclosed is a postcard for your convenience.

[fol. 931]

EXHIBIT "F"

1. The publishers need the writers and the writers need the publishers, and we both need a fair and honest ASCAP. Now the Society is run by a small group of major publishers who act as if they need no one but themselves.
2. Would we as a big publisher with no BMI affiliate risk bankruptcy by voting NO if we thought there was a chance of ASCAP being dissolved?
3. For the first time in the history of ASCAP your ballot is SECRET and your ballot COUNTS. VOTE NO!

SAM FOX PUBLISHING COMPANY, INC.

/s/ FREDERICK FOX

Dear ASCAP Member:

We are writing you with regard to the coming vote on the recently amended ASCAP Consent Order. We are a group of writers from all classes in ASCAP. We may differ among ourselves about certain details of the Consent Order, but we are all agreed that a "YES" vote is imperative.

The Government has told ASCAP that it must amend certain rules of operation, including the distribution of monies to its members and the method of electing its board of directors.

The proposed changes have been agreed to, after long negotiations, by the Department of Justice and unanimously by the board of directors of ASCAP. According to Judge Sylvester J. Ryan of the Federal District Court, the amended Consent Order embodying these changes must be voted on by the membership before he approves or disapproves it. You can only vote for or against accepting it in its entirety. Judge Ryan has ruled that the Consent Order cannot be altered at this time.

A "YES" VOTE

DOES NOT MEAN THAT YOU
FAVOR EVERY POINT IN
THE DECREE

BUT

DURING THE 18 MONTHS
FOLLOWING THE ACCEPTANCE
OF THE ORDER, ANY CONTRO-
VERSIAL POINT CAN BE RE-
EXAMINED,

AND THEN

WE, AS WELL AS THE DEPT.
OF JUSTICE WILL HAVE A
CLEARER PICTURE OF HOW
ASCAP CAN AND SHOULD WORK.

- MOST IMPORTANT

ASCAP WILL CONTINUE TO
EXIST.

A "YES" VOTE

WILL KEEP ASCAP ALIVE

A "NO" VOTE

WOULD NEITHER CHANGE
NOR PRESERVE THE PRESENT
SYSTEM

BUT

IT MAY LEAD DIRECTLY
TO A LAWSUIT INSTITUTED
BY THE GOVERNMENT,
ACCORDING TO JUDGE RYAN:

"Such litigation might
possibly sound the death
knell of ASCAP and other
similar associations"

MOREOVER, IT IS POSSIBLE

THAT DURING THE COURSE OF THIS
SUIT, WHICH COULD LAST FOR YEARS -
YOUR INCOME FROM ASCAP MIGHT BE
INTERRUPTED OR INTERFERED WITH.

A "NO" VOTE

MAY KILL ASCAP

A failure to vote has the same effect as a negative vote.

By not voting at all you may be serving the enemies from without who would like to see ASCAP destroyed.

Be sure to vote.

Whatever your type of writing or your income, whether you be writer or publisher or both, you will be serving your interests and protecting your family by voting "YES".

Your Fellow-Writers,

[fol. 934]

EXHIBIT "I"

OTTO A. HARBACH
239 CENTRAL PARK WEST
NEW YORK 24, N. Y.

November 28, 1959

Dear Fellow Member of ASCAP:

I joined our Society in 1914. Since then I have tried to serve it and you in whatever way I could—as a writer of many songs, as a member of the Board for many years, and at one time as your President. I've seen ASCAP grow from nothing to the Society of which thousands of writer and composer members are proud.

Nathan Burkan, one of our founding fathers, used to say: "This Society will never be destroyed by enemies from without—only by enemies from within."

Today the truth of this prophesy is being tested. Shall ASCAP continue to live, or shall ASCAP as we know it die? This depends on how you and your fellow members vote on the new Consent Decree, now in our hands.

If the Decree fails to win acceptance from our membership, writers and publishers will face the chaotic conditions of half a century ago, fighting for their rights in court. This may not be a bad situation for the strong, who will survive. But the weak—including many younger writers, as well as the widows and children of former members—will suffer.

A vote *for* the Decree means the continuance of our beloved Society and a chance in the days to come to smooth out rough places and improve conditions for all.

A vote inspired by your objection to some single clause means a vote *against* the whole decree. Think twice before voting to turn the clock back. It is as simple and as tragic as that.

Sincerely,

/s/ OTTO A. HARBACH
Otto A. Harbach

[fol. 935]

EXHIBIT "J"

MAY SINGHI BREEN DE ROSE

186 RIVERSIDE DRIVE

NEW YORK 24, N.Y.

Dear Fellow Member:

I have before me several letters which I have received in the past week in opposition to the ASCAP Consent Decree Order.

I am sure that the writers of these letters have been misinformed or misguided when they try to frighten members into voting against the proposed Consent Decree Order by saying their security will be jeopardized if they do not do so.

As a member of ASCAP for the past ten years and as the executrix of the estate of my husband Peter DeRose whose membership goes back to 1922, I feel I have a great deal at stake.

I have given this matter very careful consideration and I also feel I am acting as Peter would want me to if he were here. Songwriting was his vocation. He contributed generously to the ASCAP catalog and placed all his faith and loyalty in the organization.

Like Peter, many of our members were active writers from the time they joined ASCAP until they died. Such names as Victor Herbert, Sigmund Romberg, Jerome Kern, George Gershwin and many others too numerous to mention. In their unwritten wills they left the same heritage to you, to me, and to all the world. By this I mean their beautiful songs which have earned for them a permanent niche in the Hall of Fame of American music.

ASCAP is the songwriters "Rock of Gibraltar" and I urge everyone to vote "Yes" when you receive the ballot. This will mean that your security and protection will be guided honestly and fairly.

ASCAP must survive and only unity will do it.

Sincerely,

/s/ MAY SINGHI BREEN DEROSE

November 27, 1959

EXHIBIT "K"

[fol. 936]

MURRAY HILL 8-8800

CABLE ADDRESS: ASCAP, NEW YORK

AMERICAN SOCIETY OF COMPOSERS,
AUTHORS AND PUBLISHERS575 MADISON AVENUE
NEW YORK 22, NEW YORKSTANLEY ADAMS
President

November 24, 1959

To All Members Of The Society:

At the recent West Coast meeting on November 11, 1959, which was held to discuss the proposed Consent Order and the proposed Amendments to the Society's Articles of Association, I made a report to the members. In addition, Mr. Arthur H. Dean, special counsel to the Society, addressed the meeting on these subjects.

Because of the importance of these matters, a copy of my report and of Mr. Dean's remarks is being sent herewith to all members of the Society.

Sincerely yours,

STANLEY ADAMS
President

[fol. 936a]

REPORT OF STANLEY ADAMS, PRESIDENT, AT WEST
COAST MEETING, BEVERLY HILTON HOTEL
NOVEMBER 11, 1959

When we last met our attorneys had just concluded lengthy discussions with the Department of Justice lawyers, and our Board of Directors had approved the compromise agreement which is known as the proposed Consent Order.

We—the officers and Board of Directors of the Society—felt that you were entitled to a full report directly from our eminent special counsel, Arthur Dean. Your close attention to his detailed report was a compliment both to his clarity and your intelligent understanding and appreciation of our problem.

This evening our counsel is here to explain certain matters, the procedures for securing the consent of the membership and implementing the proposed Consent Order, and to answer any questions you may put to him.

Before we open the floor for discussion, I feel that it is my duty to tell you how I view the situation, speaking as one member of the music fraternity to his fellow members. Please bear with me for not more than fifteen minutes, while I exercise the prerogatives of the office of President in leading off this discussion.

As you all know by this time, the proposed Consent Order is a compromise. It does not represent a victory for the Government or for ASCAP—or a defeat for either. It does represent the considered judgment of the Government attorneys that with the changes now being made, the operations of the Society will conform to the requirements of the anti-trust laws; and on the part of the Society and its attorneys, that these changes are reasonable and fair to the members of the Society, taking into consideration the serious and possibly fatal alternatives that might face us if we were to be unyielding.

Some of you may have been led to believe that all the dissident groups are contending that we have been too conservative and have not gone far enough in the direction of, among other things, 100 percent current performances for everyone, or an equal vote for all members.

I attended the hearing before Chief Judge Ryan on October 19th and 20th and noticed that some opponents of the proposed Consent Order were very forceful in their contention that we have been too radical and have gone too far; that we should have preserved more of seniority; that we should not have removed the brakes on a writer's demo-

Adams Letter to ASCAP Voters Draws Roosevelt Ire

Calls Threat of Government Lawsuit 'Attempt to Intimidate'

By MILDRED HALL

WASHINGTON. — Rep. James Roosevelt has issued a scathing rebuke of the recent letter sent to ASCAP membership in which its president, Stanley Adams, insistently points out that a vote against the proposed consent decree negotiated by Justice Department and the Society's attorneys, might mean a government suit, with possible "dissolution" of the American Society of Composers, Authors and Publishers (The Billboard, November 9, 1959).

"Any threat of a law suit appears to be an attempt to intimidate," is the grim comment of Roosevelt, whose House Small Business Subcommittee held exhaustive hearings on the ASCAP small-business complaints, in 1958, leading to the negotiation of the ASCAP consent decree.

Complete Statement

Roosevelt's complete statement follows:

"It has come to my attention that a letter bearing the signature of ASCAP's president has been mailed to members of the Society urging them to vote to accept without change the proposed consent decree filed with the court a few months ago. I am told that this letter, in no uncertain terms, tells the members that if they vote

against the acceptance of this decree, a law suit by the government against the Society would follow which may result in the dissolution of the Society.

"It is well known that many of the members desire to amend, strengthen or otherwise improve the provisions of the decree presently under consideration and it would seem to be self-evident that their desires are entitled to be considered. I find it quite disturbing therefore, to be informed that the members are being told that they may vote on the proposed decree, but that their freedom of expression is limited to the acceptance of the decree as presently drawn or the acceptance of a law suit that may kill the Society.

Attempt to Intimidate

"It seems to me that the only thing that could bring about a law suit by the government against the Society would be a refusal of the government and the Society to recognize the will of the majority. If the ASCAP members reject the decree and the court rejects the decree, clearly a mandate has been issued which compels the Society and the government to seek to reopen their negotiations in order to enable themselves to present a more equitable and acceptable decree to the court. Any threat of a

lawsuit appears to be an attempt to intimidate.

"Our subcommittee held exhaustive hearings last year that served to demonstrate the compelling need for changes in the policies and procedures of the Society in order to permit the smaller writer and publisher members to remain in business. The negotiations which led to the tentative adoption of the consent decree originally were intended to remedy those inequitable practices of the Society shown by the hearings to threaten the continued existence of its many small business members. My views respecting and adequacy and acceptability of the consent decree are set forth in an analysis to which reference was made during the course of October, 1959, hearings before the court. Upon request, copies of this analysis will be supplied by the House Small Business Committee, Washington 25, D. C."

VOTE NO! add 30% to your current performance income!

tion; that we should not have given anyone an option of 100 percent current performance; that we should not have diluted the voting rights of the large producers.

This Consent Order has charted a course down the middle of the stream to avoid the shoals on one side and the reefs on the other. This is the essence of compromise, and this we did.

We must all start with the premise that we, as a Society, were—and indeed still are—faced with a very serious problem. Call it an ailment, if you will, for organizations are subject to attacks and illnesses just as in the case of the individual human being. We in ASCAP have thus far exhibited the strength, adaptability, power of resistance and resilience of a basically healthy organism. We are now faced with a new test of strength and courage. The challenger has the backing of all the forces of the Government of our country. In a sense, the challenger is also the physician—for it is the duty of the Government to preserve healthy organisms as well as to attack and destroy those that may be harmful to the rest of the community.

The Government has conceded that our Society should be encouraged to survive—that it serves the public interest. It has examined ASCAP from stem to stern. You know what the attacks have been: first and foremost, that the Society was unduly considerate of its older members—that on the writers' side demotions were too slow, that seniority was too high and that too little consideration was given to [fol. 936c] the value of a current performance. The Department of Justice threw in another one—that the top 100 writers were being compelled by the remaining writers to give up too great a part of their earnings. At the same time, and incongruous as it may seem, it was charged that these same top 100 writers—and the top publishers—had such great voting power that a few of them might band together to favor themselves at the expense of their less productive brothers. A compromise on the subject of voting was reached very quickly. The voting formula now before you was set up to conform to the position taken by the Government almost at the outset.

In viewing the kind of regulation we may expect or accept, we must try to look at ourselves as others see us, and then try to view our Society as it appears to members other than ourselves.

Our 1950 Consent Decree gave all users an assurance against any possible abuse of our collective power, by giving a Federal Court the full authority to determine the reasonableness of our rates. This can only be done by legislation or by a consent decree. We accepted the latter form of regulation, and we think it has been in the public interest as well as our own.

We still have with us the question of distribution. That will be a thorny problem as long as we license and collect for the use of our works in bulk form. (Of course, if licensing were on any other basis, there would be no need for our Society as we know it.) What values do our users assign to the many performances of certain works that have little lasting quality as compared with the lesser number of performances of other works that are known to and loved by millions of people of all ages? Does the writer or publisher who has been loyal to the Society in good times and bad have a claim to present consideration because of his contributions and sacrifices over the years? Bearing in mind our obligation to encourage those who wish to enter our [fol. 936d] craft, what sacrifices can we require from those who are enjoying substantial returns from catalogues which they have built up during decades of devotion to their calling—I refer particularly to the top 100 writers of whom we hear so much, and who in the past have demanded relatively so little on a per performance basis. How can we ever hope to reconcile wholly the views of a member whose works are used mainly in motion pictures as against the views of the popular writer who seldom had a song in a picture? What do all of us owe the writers and publishers of serious and religious music which add so much prestige to our catalogue and help to fulfill our mission as a great contributor to the musical life of our nation?

No two members are apt to agree on this now or at any time in the future. No two members of the Board of Direc—

tors have exactly the same views. We must try to reach a fair compromise. If we produce a formula which discriminates unfairly as against one member or group of members, they may secure redress from an outside body selected by the American Arbitration Association. We believe that this will solve our distribution problem, just as the rate-fixing provision of the 1950 amendment of the Consent Decree solved the problem of what is a reasonable price for our catalogue.

I can understand the feelings of many members that they could have worked out something better than did the ASCAP Board of Directors and its counsel. This is not unique to ASCAP and its membership. Every military battle has been re-fought by armchair strategists, who can show a better plan than the generals who had to make the decisions. Regarding these decisions, what I have just outlined are only a few of the problems that confronted us in the administration of the Society, and regarding such administration I will concede that there are no geniuses on the Board of Directors.

I will also contend that there are no geniuses off the Board of Directors.

[fol. 936e] I will admit that, being human, members of the Board make mistakes. I will also assert that those off the Board, being human, make just as many errors.

But I do feel that with long experience and with deep application to the job at hand, the Board of ASCAP collectively can better analyze the needs and requirements of all segments of the Society and can best reconcile all divergent views.

Talking about divergent views, there is a group in the Society who, in all sincerity, have a firm conviction that we should contest any change, resist these proposals, prepare to litigate and take our chances in the court.

To any member, to whom the result would make little or no difference, there is nothing that I can say, but to those who, to varying degrees, depend on their income from the Society, they know that the most sympathetic landlord

wants his rent or mortgage payment; that the insurance company insists upon the payment of premiums; that the corner grocer wants his money.

And so, the spectre of that old triumvirate, of food, clothing and shelter is always before the eyes of the Board of Directors when they are called upon to make decisions of this sort.

Sure, a gambler takes a chance and goes for broke. But he is only taking a chance with his own money.

Believing that we can exist and prosper under the new Consent Order, we have decided that litigation would be wrong. So we will not go for broke. We are not going to take a chance. We will not gamble with your economic lives, with the destiny of your family, or with the security of your children.

For a long time, the Department of Justice talked and we listened—we talked and they listened—we both talked and we both listened. And as they talked we learned—as we [fol. 936f] talked they learned. The compromise, as evidenced in the new Consent Order, is the culmination of what we both learned.

Where is it written that the opponents of the Decree are right and that we are wrong?

What unseen power has given them the vision that has been denied to the rest of us?

Who among them is the great chef who has concocted the recipe that will please the taste of us all?

I repeat, *all of us*, not just them, not just you, not just me, but *all of us*.

However, if you, in your wisdom, affirm this Consent Order, I will pledge myself to fight against any stand-patism, any willingness for the Society to drift along, any tendency to let the future take care of itself.

Such a course of action will only bring a repetition of what we have just gone through.

To this end, I have two things in mind. When and if the Decree is approved by the members and by Judge Ryan,

with the exception of altering the weighted vote provision. I will ask the Board to examine suggestions of any member or group of members, as soon as possible, and to act upon them, if such action is indicated. Secondly, regarding the writer membership, I intend to appoint a committee from the general membership to act in an advisory capacity to the Writer Board. The West and East, the serious and popular, the big and small catalogues, both as to size and income, and the old and young writers, shall all be represented.

There is no reason why this should not be. I believe that, in addition to its duly elected representatives, members should be encouraged to express their views and be assured that their voice shall be heard in the guidance of our [fol. 936g] Society, for without the Society we are all bankrupt financially and creatively.

If we fight each other now we will have dissipated the energies that we will need in the days ahead.

This Society is in the nature of a family and what individual member of a family likes all of his relatives. But if you sit down at the table and talk things over you may find out that Cousin Jim and Uncle John are not so bad after all. This is a far better method than the one used by the Hatfields and McCoys.

There is no war as bitter as a civil war.

Let us avoid it.

There is nothing that means more to all of us than ASCAP. Let us preserve it.

Let us not open our arms to possible disaster, for, as Judge Ryan has said, and I quote:

"But, you know, the thought comes to my mind that if you people who are members of ASCAP can't agree amongst yourselves as to what is fair, when the government has made an impartial study and recommends it, you might wind up with no association at all, and you will have something to worry about."

[fol. 936h]

REMARKS OF MR. ARTHUR H. DEAN AT THE
WEST COAST MEETING OF ASCAP
ON NOVEMBER 11, 1959

In August, as your special counsel, I had the pleasure of speaking to the West Coast members of the Society for the first time. As you well remember, I then described in considerable detail the provisions of the proposed Consent Order, which, if signed by Judge Ryan, would amend the Consent Decree that was entered in 1950 in *United States v. ASCAP*.

This time, you will be pleased to learn, my remarks will be much briefer and far less technical. I will try only to summarize the present status of the proposed Consent Order and explain the single remaining question that will soon be put to the entire membership.

I. STATUS OF THE PROPOSED CONSENT ORDER

On October 19 and 20, 1959, hearings on the proposed Consent Order were held in New York before Judge Ryan, who is Chief Judge of the United States District Court for the Southern District of New York.

Before I describe those hearings, I would like to tell you just what Judge Ryan's role is in this whole proceeding. I do this so that you will understand why and how he is in a position to pass upon proposed rules and regulations that would govern the internal affairs of your Society.

In 1890, the Congress passed a law known as the Sherman Act, which made unlawful any contract, combination or conspiracy in restraint of trade. Its more common name is the "Antitrust Law".

Under the Antitrust Law, it is generally considered unlawful for a group of competitors to join together and pool their resources, and then to bargain together in common with the buyers of their products. The law is generally [fol. 936i] understood to apply to commercial business. But, in 1941, it was charged that ASCAP represented a combination of competing writers and publishers who, by

Paul Green	Burton Lane	Richard Long
Walter Bishop	Larry Stock	Alan Flynn
Robert Gaer	Frank Sweet	Sydney Green
Robert Gaer	Frank Sweet	Jack Gould
Robert MacEwen	Ernie Swift	Johnny Andrews
John Quibach	Edward Slivan	Ered Ellstrand
John Galt	Norman Wellsford	Bert Wellsford
James W. Vign	John Winters	Charles Previn
Leonard W. Vign	Murray Wood	Domenico Savino
Louis Aitor	Helmy Kress	<u>Loca Rio</u>
Frank Herman	Richard Kuper	Art Ridgely
Joseph Allan Harty	Mitchell Parist	Rich Charles
Eoghan L. Harty	Charles Jones	Joseph Meyer
Jack Lawrence	Vivian Thomson Vic M 1334	
E. J. Harbuz	Harold Jones	

pooling their copyrights and offering blanket licenses, were violating the Antitrust Law.

And in 1941, ASCAP consented to a court order regulating certain aspects of its operations, particularly with its licensees.

The consent decree is the device whereby a defendant charged with violation of the Antitrust Law denies the violation, but, rather than to litigate that question with all its inherent risks, agrees to certain court restrictions on its activities.

Accordingly, the 1941 ASCAP consent decree contained several provisions with respect to ASCAP's licensing of its catalogue. It also contained a few provisions regulating the Society's relations with its own members.

In 1950, a second consent decree was entered in that case. It, too, set forth provisions affecting ASCAP's internal affairs.

Moreover, under the 1950 decree the Federal District Court in New York was specifically given continuing jurisdiction over this decree.

This means that the Government can go back to that Court and ask for further orders with respect to the operations of ASCAP. The Government must show, of course, that such additional orders are needed in order to protect the public interest in competition among song writers and song publishers.

Under the procedures of the Federal Court in New York, a specific judge is often assigned to a particular consent decree. This is so that the Court will be familiar with the general problems of that decree in the event further proceedings arise under it.

[fol. 936j] Chief Judge Ryan has been assigned to the ASCAP decree. Thus, he has the authority to determine whether any proposed amendment or modification of the decree will carry out the original antitrust objectives of the suit brought in 1941, or whether the case should be retried.

On June 29, 1959, the Department of Justice filed with the Court the proposed Consent Order we worked out with the Department of Justice.

Copies were sent to all the members of ASCAP. It was discussed at membership meetings here and in New York, and the members were given time to consider it.

On October 19 and 20, 1959, Judge Ryan conducted hearings on the proposed Consent Order.

At these hearings counsel for the Department of Justice explained the meaning and intended effect of the major provisions in the Consent Order. At the close of the Government's presentation, the following exchange took place between Judge Ryan and the attorney for the Department of Justice:

The Court: "All right. I understand now that it is the considered judgment of the Antitrust Division of the Attorney General's office that this proposed amended decree is the best in their judgment that can today be devised and framed."

Mr. Bennett: "That is my understanding, your Honor; that the alternative would be litigation on the subject."

The Court: "And that your Department recommends it to the Court without reservation of any kind."

Mr. Bennett: "That is correct, your Honor." (Transcript, pp. 100-01).

Later in the hearings, Judge Ryan asked me to express my opinion, as special counsel for the Society, on the over-[fol. 936k] all significance of the proposed Consent Order. I shall quote that portion of the transcript:

The Court: "... The point involved here is do you feel, Mr. Dean, representing the Society, that you have accomplished the best possible results in light of the purposes of this suit for the Society as a whole and for its individual members?"

Mr. Dean: "Yes, your Honor, I do. I can say that unqualifiedly yes."

Judge Ryan's order of June 29th invited only those members who opposed the Consent Order, to attend the hearing and request to be heard.

Accordingly, apart from the lawyers of the Department of Justice, and myself as counsel for ASCAP, the very large number of members who wholeheartedly approve the proposed Order did not appear before Judge Ryan.

On October 19 and 20, Judge Ryan permitted members in opposition to the Order, either in person or by counsel, to state their objections to various provisions of the Order and to give their reason for the objections.

MAJOR OBJECTIONS

I would now like to take a few minutes of your time to summarize the major objections that were presented to Judge Ryan. I would then like to give a brief explanation of the reasons behind each of the principal provisions of the order that was objected to /

1. *The Survey.*

A few members objected that the new objective survey (which, as you know, went into effect on October 1 this year) will not take a complete census of all music performed on every radio and television station in the country. [fol. 936l] A few others criticized the fact that the new survey would not take a day by day census of all programs on the ABC radio network and all radio network sustaining programs, but instead would survey these programs on a scientific mathematical sampling basis.

In reply to these objections, I can assure you that over a year of thought and effort was spent by independent survey experts engaged to work out this survey.

The objective was always clear, however: we wanted the most accurate and representative music survey possible without prohibitive expense.

Thus the local radio survey was substantially increased.

After a reasonable trial period, the reviewing experts may conclude that changes may be necessary.

In this connection, I want to assure you that this survey, will be the object of constant study and that it will be periodically reevaluated by the experts in the light of experience.

In answer to the specific objections I mentioned: ABC radio programs will no longer be logged in their entirety. The reason for this is that the amount of revenue now received by ASCAP from that network no longer justifies such an expense.

Of course, ABC radio programs, such as "The Breakfast Club", will be picked up in the local survey and music performances thereon will receive their proper credit. Each ABC radio program included in the local survey will be checked against the ABC network logs to assure full identification of all music on the program.

Radio network sustaining programs are no longer being logged on a complete census basis for two reasons: (1) they do not generate enough ASCAP revenue to warrant such an expense; (2) the radio networks don't know how many [fol. 936m] affiliated stations carry any specific sustaining radio program.

In the event that non-identification of music picked up in the local survey is substantial, the Society will request logs from the local stations in question and will check them if they are available. The determination of the need for these logs will be made by the supervising survey organization in accordance with sound and accepted survey practice.

Some members have suggested that the survey be conducted in its entirety by an outside organization, including the collection and processing of the program logs and tapes. Now, we carefully considered this possibility, and concluded that no existing outside organization could collect and process the needed survey material at a cost anywhere near as low as that now being spent by ASCAP for these functions, or as accurately.

Moreover, you may rest assured that the survey will be periodically reviewed, by an independent outside organiza-

tion, from top to bottom not only to make sure that the survey is fair and representative, but also to make sure that the local tapes are being properly monitored and that the network logs are being properly analyzed for credit purposes.

2. *The Weighting Rules.*

Some members have stated that no distinction should be made among different musical works when they are performed as non-feature uses, such as themes or as background, cue or bridge music.

This problem was studied in painstaking detail by the Society, its counsel, and by the Department of Justice.

Everyone who considered the question at length came away with the same basic conclusion: i.e., there is generally [fol. 936n] a fundamental difference between the functional purpose served by a well-known song and the role played by relatively unknown music when the two are used as non-feature music.

A well-known song will usually be performed in a non-feature use, such as background music, only with the specific intent of projecting the image or memory associated with that song into the format or storyline of the program. Thus, throughout such a performance, regardless of its length, the well-known song plays a key role in the development of the program.

A relatively unknown work, on the other hand, is typically performed as a non-feature use with only a passing atmospheric effect on the audience.

A great deal of thought and research was given to the formulation of a sound and workable qualifying test that would distinguish truly well-known songs from the many thousands of works that are not recognized by the general listening public.

This test combines two requirements: (1) a work must have been a real national "hit" at one time, and (2) it must have been performed in recent years enough times to be considered as still "alive" in the minds and memories of most listeners.

I call your attention to the fact that a brand new song can qualify as soon as it receives 20,000 feature performance credits, an amount that is often accumulated by a real hit in its first year.

3. *The Recognized Works Performance Fund.*

Some writers have objected to the Recognized Works Performance Fund, which would distribute 30% of the money allocable to the writers' four-fund system on the [fol. 936o] basis of performances of works which are at least one year old.

The soundness of the theory underlying this fund is demonstrated again and again every time ASCAP sits down to bargain with its licensees.

The songs with the real earning power are those which have withstood the acid test of time. As a rough general rule, it can be said that songs that are played after the initial launching period of their first year are songs that have earned a real place in the public consciousness.

It is true that the current "hits" of today initially would not participate in the Recognized Works Performance Fund. But the writers of these songs should remember that many of them will become the "standards" of tomorrow. And, to the extent that they are played, they will then share in the Recognized Works Performance Fund.

It is worth noting that the Recognized Works Performance Fund has been vigorously endorsed by many of the most successful writers who, as you know, have in the past been leaving in the Society, for distribution to the other writer members, a very substantial sum—about \$2 million last year—which would otherwise have been available to these successful writers if distribution were made solely on the basis of performances.

The most successful writers believe in the recognized works principle as giving a fair premium to the men and women whose songs have made a lasting contribution to American music.

Lastly, I point out that if a writer member believes the Recognized Works Performance Fund discriminates

against the type of works in his catalog, he may for himself elect the current performance option and receive the exact pro rata of the writers' money that is represented by his most recent available performance credits.

[fol. 936p] 4: *The Current Performance Option.*

Two objections have been made by some writers to the Current Performance Option: (1) it is limited to the first 39,000 credits received by a writer in any one year; (2) the writers electing this option will not share in the substantial "flowdown" from the top approximately 100 writer members because of the diminishing credit per performance above 39,000 credits.

I think both of these objections are ill-founded. Let me tell you why.

It is true that members electing the current performance option thereby give up the right to share in this "flowdown". But, try as we would, we could not see how any member can be paid 100% on the current performance option basis for up to 39,000 performance credits, and also have the right to share in the money which would have gone to the approximately 100 most successful writers if they also were paid strictly on a current performance basis.

As everyone in the Society knows, there is a truly magnificent tradition among the most successful writers of giving up much of the money to which they would otherwise be entitled on a strict performance credit basis.

The Society believes that so long as the top writers continue this tradition, the current performance option should be limited to 39,000 credits a year (which is now approximately the lowest average of any of the writers in Class 975 and above).

For any credits in excess of 39,000 in a given year, a writer electing the current performance option would be paid on the four-fund basis. Or, if a writer elects the current performance option, then if he so desires, he can switch to the four-fund basis (*retroactively* for that year and receive the advantage of averaging a big "hit" year over a five-year period.

[fol. 936q] Let me be clear. There is no penalty imposed upon a writer who has taken the current performance option and whose works then suddenly become very popular.

As for the second objection to the current performance option: the "flowdown" benefit of the four-fund system is part and parcel of an integrated distribution plan of ASCAP that also contains the elements of averaging, seniority, and recognized works.

None of these elements can be viewed separately. All must be taken together. Indeed, it is doubtful that the top writers would continue to endorse the "flowdown" if it were to be diverted to a system that did not have these elements.

Some of the older writer members of ASCAP who did so much to create the benefits of this Society which all members now enjoy, were initially vigorously opposed to the current performance option, which would permit other writers to avoid the principles of averaging, of recognized works and of seniority.

Yet, we tried to be as fair as possible to all members of the Society, including those who criticized these principles.

As a result, we have worked out this election whereby members can elect to receive distribution either on the four-fund system or under the current performance option.

5. *The Publisher Voting Formula.*

Some publisher members have objected to the proposed publishers' voting formula. They claim that it leaves too much voting power in the hands of the Society's most successful publishers.

On the other hand, it is clear that the many publisher members of ASCAP make extremely varying contributions to the value of the Society's catalog. A fair system of allocating votes must take account of this fact.

[fol. 936r] I firmly believe that the two different points of view have been reconciled in the proposed formula. Under that formula, as I pointed out in August, the voting

strength of the present top 10 publishers and their affiliates would be reduced from about 63% at present to about 37% of the total publisher votes. It is thus clear that this represents a very substantial reallocation and broadening of the publisher votes.

And, of course, under the new formula any group of publishers representing 1/12th of the total available publisher votes could elect a director by designating any eligible person in a petition filed with the Society 90 days in advance of the general election.

6. *Access to Records.*

Some members have complained that the proposed Consent Order does not assure them adequate access to the Society's records. I believe that these fears are without valid foundation.

Every member will be permitted complete access to information concerning his own works, provided his request is sufficiently specific so as to enable the Program Department to find the records he seeks.

He will also be permitted to see information relative to the performance records of other members' works if the inquiry is made in "good faith" in connection with his own financial interest as a member of ASCAP.

One of the lawyers at the hearing asked Judge Ryan who determines "good faith". Judge Ryan said he would.

It must always be borne in mind that ASCAP has records of very real economic significance for almost 7,000 actual and potential competitors. The Society would not be discharging its duty to those members if it permitted their key business records to be inspected by someone whose inquiry [fol. 936s] was not related to his legitimate interest as a member of the Society.

For the few members who have suggested that all records of the Society be opened to all members, I should like each of the members to consider whether he would be happy if someone who had written one song could become a member and thereby have unlimited access to all information regard-

ing the business affairs of every other member of the Society and be free to broadcast this information to the world, including BMI.

7. *Foreign Revenue.*

A few members have stated that all revenues collected by the Society from foreign sources should be distributed on the basis of the music performances as reported by those sources.

I can assure you that we have studied the foreign reports furnished to ASCAP and we have concluded that this task would be disproportionately expensive and, in some cases, impossible.

Thus, in order not to consume too much of the members' money in administrative and clerical expenses, the Consent Order requires the Society to distribute foreign revenues on the basis of the applicable foreign reports, to the extent those reports are reasonably usable, when more than \$200,000 a year is received from the source in question.

8. *Elimination of Ten-Year Option and "Brakes" On Demotions In The Availability Fund.*

Some members have criticized the proposed Order in so far as it would eliminate the ten-year option for averaging credits presently available to the writers. Other writer members have indicated keen disappointment over the proposed removal of the five-year "freeze" on Availability rankings.

[fol. 936t] The Society was, of course, extremely reluctant to take away any aspects of the Writers' Distributor Formula that provide some measure of financial security for writers and their families. We are dealing with an antitrust suit. And the Government asserted that one effect of these two features of the distribution system was to retard the rate of advancement of successful young writers and thus restrain competition.

What were we to do? There is only so much money to distribute. The Department of Justice argued that the older

writer members whose works had declined in popularity would receive a disproportionate share of the distributable revenues to the disadvantage of younger writers whose songs are currently more popular." The Department argued that the younger writers were being discouraged.

Therefore, in order to achieve a satisfactory over-all Consent Order, the Society agreed to eliminate these two provisions from the Writers' Distribution Formula.

I call your attention, however, to the fact that in the future classification demotions will be spread evenly over a three-year period.

A further special section in the proposed Writers' Distribution Formula provides that any ranking decreases between present classifications and initial classifications under the new formula will be spread evenly over a four-year transition period.

II. THE PROPOSED AMENDMENTS

A few days after the New York membership meeting on November 24, 1959, ballots will be sent to each member on which they can (a) express their approval or disapproval of the proposed Consent Order; and (b) vote on the adoption of amendments to the Society's Articles of Association [fol. 936u] which are necessary in order to carry out certain provisions of the proposed Consent Order.

Each member received a copy of the proposed Consent Order early in July. An additional copy will be mailed to each member together with the ballot.

You all have recently received in the mail a copy of the proposed amendments to the Articles of Association which must be approved before the proposed Consent Order can be signed.

Because some of you may lose or misplace these proposed amendments before the ballot is received, an additional copy will be enclosed with the ballot.

I propose now—at this point—to summarize very briefly the proposed amendments to the Articles of Association:

(1) Resigning members meeting the applicable requirements would receive distributions for works that continue to be licensed by ASCAP;

(2) In addition to the persons nominated by the Nominating Committees, the list of candidates for directors would include any eligible person named by 25 or more members of the respective class in question;

(3) The basis for allocating votes would be amended so as to substitute the new voting formulae;

(4) The voting provisions would be amended to include the provision for election of a director by a group representing 1/12th or more of the writer or publisher votes;

(5) The proposed amendments would provide that any member, writer or publisher, who received no performance credits in the latest available fiscal survey year would not be entitled to vote;

[fol. 936v] (6) The percentage of total available publisher votes that could be cast by the top ten publisher members and their affiliates would be limited to 40.8%, or 10% more than the voting strength they would initially have (37.1%);

(7) A special provision would permit the Board of Directors to hold the next directors' election prior to 1961, when it would normally be held. This provision is in response to Judge Ryan's request that an election under the new voting formulae be held as soon as possible if the Consent Order is approved;

(8) The Articles would provide that all rules and regulations affecting distribution would be mailed by ASCAP to all members of the class affected thereby;

(9) The Articles would reflect the accelerated procedure for handling distribution complaints. Complaints would be entertained, in the first instance, by the impartial Board of Review to be elected by the members, not by the respective Classification Committees. An appeal from a decision by the Board of Re-

view could be taken directly to an impartial Panel of the American Arbitration Association;

(10) The composition of the Board of Review would be determined on the same basis now applicable to the existing Board of Appeals, except that the new voting formulae would be used.

The other changes in the Society's practices that would be required by the Consent Order do not entail changes in the Articles of Association.

[fol. 936w] III: FUTURE CHANGES

I should like to emphasize that there are many areas in which future changes and improvements could still be made if the Consent Order were adopted. In many respects, the Consent Order would be like a broad constitution: specific legislation by the Board of Directors would still be needed to carry out its rather general principles.

In this connection, I must emphasize that you will only be asked to vote for or against the Consent Order itself—not for or against the Writers' Distribution Formula and the Weighting Formula.

Those two formulae would be deemed by the Department to be initially in compliance with the more general provisions of the Consent Order.

It is essential to bear in mind, however, that those formulae could be reevaluated and changed from time to time in the light of experience under them. Of course, 30 days advance notice of such changes would have to be given to the Department of Justice and the changes would have to be consistent with the broad principles contained in the Consent Order.

You should all read the Consent Order carefully to see which provisions it contains and which provisions appear only in the Formulae.

For example, the proposed Order provides only that the Recognized Works Performance Fund shall not exceed 30% of the revenue distributed under the Writers' four-fund system.

Likewise, the *Weighting Rules*, which would be part of the Order itself, permit the Society to impose limitations on the credit to be awarded to multiple performances of the same work or aggregate performances of all works on a single program or during a period of programming or [fol. 936x] on a continuous series of the same program which is presented two or more times per week."

The *Weighting Formula* contains certain specific provisions that would carry out these principles. It may develop, however, that changes in or additions to the specific formula provisions may be found necessary, in the light of actual experience, in order to achieve the fairest possible system of distribution.

As for the survey, the Consent Order sets forth certain broad principles.

I assure you that study of the survey will be continued and that changes can be made in the light of experience under the new plan.

I mention only a few of the more important points. The Board of Directors will continue to study and evaluate the rules and practices of the Society in the attempt to conduct ASCAP in the best interests of the general membership and the public.

IV. GENERAL OBSERVATIONS

My advice to the Membership on the problem now before you can best be summed up by quoting a concluding observation of Judge Ryan towards the end of the hearings:

"While individual members may have objection to one particular subdivision of the decree they may feel that others are advantageous and desirable and that on an overall basis they will take the bad with the good to accomplish an overall improvement. That would be my idea." (Transcript, p. 351)

I know that some of you are not happy with every one of the provisions of the proposed Order. It would be preposterous for me to tell you that everything will improve

for everyone. You know as well as I do that there is just [fol. 936y] so much money to distribute every year, and that if one class of members gets more by virtue of a new provision, some other class of members will get less.

I do believe, however, that—taken as a whole—the proposed Consent Order will achieve real improvements in the Society's rules and practices and in your public relations and in your relationship with the Government. I truly think the Consent Order would be in the best interests of the general membership.

I would like now to describe briefly the technical details of the vote soon to be taken by the membership.

Each member should receive a ballot in the mail around November 30th or December 1st. You will be asked to cast a single vote—either "yes" or "no". That vote will be for two purposes:

(1) to express your approval or disapproval of the Consent Order *as a whole*. *There will be no piecemeal voting for the Order, provision by provision;*

(2) to vote for or against the proposed amendments to the Articles of Association, which would be needed to carry out certain provisions of the Consent Order.

As an unincorporated association subject to New York law, the Articles of Association can be amended only as provided in the Articles themselves.

The Articles provide that each member shall be sent a numbered ballot, which can be replaced if it is lost or torn or for any reason cannot be used. If that occurs, please ask immediately for another ballot.

The Articles of Association also require that the ballot be signed, and that it be received by ASCAP within 20 days of the date the ballot was mailed by ASCAP. Ballots received after that date cannot be counted.

[fol. 936z] Votes will be counted according to the existing provisions of the Articles of Association. Thus, each writer member has one vote for every \$20 he received from ASCAP in the year ended December 31, 1958, and every

publisher member has one vote for every \$500 he received during that period, with a minimum of one vote per member.

For an amendment to the Articles of Association to be adopted, it must receive the affirmative vote of an average of two-thirds (1) of the writer votes eligible to be cast and (2) of the publisher votes eligible to be cast, the votes to be computed in accordance with the provisions of the Articles of Association which I have just described.

It is therefore crucial that every member cast his vote.

If the requisite number of members vote "yes" on the ballot, the Articles of Association will be adopted and put into effect.

Judge Ryan also requested that—for his own information and solely on the question of the approval or disapproval of the proposed Consent Order—the votes to be tabulated in two ways, first, on the basis of the weighted vote presently provided in the Articles of Association, and second, on a numerical or member-by-member basis.

I cannot tell what significance will be attached by Judge Ryan to the numerical tabulation of "yes" and "no" votes on the proposed Consent Order. For example, a numerical vote may not be meaningful if most of the "no" votes are cast by members whose catalogues in the latest available fiscal survey year have received no performance credits, of where the performance credits were so few, for example, as barely to cover the member's annual dues.

In conclusion, let me state that I was retained—presumably because of my antitrust and government experience—to act as special counsel for this unincorporated membership association on this antitrust suit brought by the Government. As such, I have done my best to represent the Society as a whole, as well as all of its members.

I have advised the Board of Directors as to what in my judgment was the best solution of the demands by the Department of Justice to amend the ASCAP consent decree. And, in this connection, I have advised how the Society

could best continue to serve all of its members fairly and impartially.

Some members have asked why I did not recommend that we litigate with the Department of Justice, to prove that the Society had not in fact been violating either the 1950 consent decree or the requirements of the antitrust laws.

My answer was that litigation is a horse race and there is always a possibility that the best horse, even after clearing the last barrier, can throw a shoe or stumble in the home stretch. In other words, no lawyer can tell in advance exactly how a complicated antitrust lawsuit will turn out—how the evidence will be received by the Judge.

Therefore, we took it to be our job as special counsel, to weigh the purposes of ASCAP, to view the practices of ASCAP objectively, and to work out such changes as seemed necessary and desirable to achieve a result satisfactory to the Department of Justice, to Judge Ryan and, of course, to ASCAP and its members.

I firmly believe that the proposed Consent Order, and the amendments to the Articles of Association necessary to put the proposed Order into effect, are in the best interest of all of the members.

I therefore urge every member of the Society to cast his vote on the forthcoming ballot, and I urge that the vote be cast in favor of approval of the proposed Consent Order and the required amendments to the Articles of Association.

This is a crucial matter for the Society and all of its members, and therefore you are faced with a crucial choice.

[fol. 936bb] To reject this proposed Consent Order would be to invite the grave hazards of litigation, and, as Judge Ryan pointed out at the hearings in New York last month, a possible result of such a trial might be a judicial order requiring the dissolution of ASCAP, a result which, I am sure, no member wants.

If any member of ASCAP urges you to vote "No"—to risk dissolution or to risk possibly adverse legislation or even stricter government regulation, I suggest you ask him wherein his real interest lies—in ASCAP or elsewhere.

[fol. 937]

EXHIBIT "L"

MURRAY HILL 8-8800

CABLE ADDRESS: ASCAP, NEW YORK

AMERICAN SOCIETY OF COMPOSERS,
AUTHORS AND PUBLISHERS
575 MADISON AVENUE
NEW YORK 22, N. Y.

STANLEY ADAMS
PRESIDENT

November 30, 1959

IMPORTANT

TO ALL MEMBERS OF THE SOCIETY:

In response to a number of inquiries and to clarify the matter, I wish to advise that the Board of Directors has unanimously approved the proposed Consent Order and urges you to vote "YES".

Sincerely yours,

AMERICAN SOCIETY OF COMPOSERS,
AUTHORS AND PUBLISHERS

/s/ STANLEY ADAMS
Stanley Adams
President

MURRAY HILL 8-8800

CABLE ADDRESS: ASCAP, NEW YORK

AMERICAN SOCIETY OF COMPOSERS,
AUTHORS AND PUBLISHERS575 MADISON AVENUE
NEW YORK 22, N. Y.STANLEY ADAMS
PRESIDENT

December 5, 1959

TO ALL MEMBERS OF THE SOCIETY:

On November 29, 1959, a ballot on the proposed amendments to the 1950 ASCAP Consent Judgment and on the proposed amendments to the Articles of Association was mailed to each of you.

Your ballot, with your vote indicated on it, must be received by midnight, Saturday, December 19, 1959. In view of the heavy Christmas mail, please be sure to vote as soon as possible.

If your ballot has been lost, misplaced, mutilated or destroyed, please write to Mr. Herman Finkelstein, General Attorney for the Society, informing him of that fact and he will arrange for its replacement.

In the past three weeks you have received several letters with respect to the proposed amendments to the Consent Judgment.

Some of those who have urged a "no" vote have quoted excerpts from a memorandum filed by the Department of Justice with Chief Judge Ryan. It is important that you know that these quoted excerpts are references to criticisms of existing rules which will be changed by the proposed amendments to the Consent Judgment if you vote "yes".

The Department of Justice has made no criticism of the provisions of these proposed amendments but instead has asked that they be approved by Chief Judge Ryan. The

Department's memorandum states that the amendments are designed to remedy the criticisms of the existing rules quoted in some of the communications which urge a "no" vote. However, that fact was not called to your attention.

The Board of Directors, in standing squarely behind the proposed amendments, agrees with the statement of the Department of Justice to Judge Ryan that it is the considered judgment of the Antitrust Division that this proposed amended decree "is the best in their judgment that can today be devised and framed."

We therefore believe that its approval by the membership and by Chief Judge Ryan would be a real step forward in the development and improvement of our great Society.

Vote "Yes" today.

Sincerely yours,

/s/ STANLEY ADAMS
Stanley Adams,
President.

[fol. 939]

EXHIBIT "N-1"

MURRAY HILL 8-8800

CABLE ADDRESS: ASCAP, NEW YORK

AMERICAN SOCIETY OF COMPOSERS,
AUTHORS AND PUBLISHERS575 MADISON AVENUE
NEW YORK 22, N. Y.STANLEY ADAMS
PRESIDENT

December 3rd, 1959

DEAR FELLOW MEMBER:

At the Membership Meetings in New York, California, and Chicago, I promised to appoint an Advisory Committee within three months after the amendments to the Consent Judgment are approved.

The response from the membership has been most gratifying.

Because you may have missed the enclosed article showing Variety's appraisal of what is regarded as a progressive step, I am sending a copy to all writer members.

Sincerely yours,

/s/ STANLEY ADAMS
Stanley Adams,
President.Encl.
SA:AW

'We The People' Songsmith Panel Eyed by ASCAP

In a move aimed at promoting greater harmony in the ranks, ASCAP prexy Stanley Adams has recommended the formation of a consultative writers' committee taking in all geographical areas and clefing categories within the membership. The committee would be a loosely representative body, open to virtually everyone and capable of serving as a sounding board for criticism and recommendations.

Adams pointed out that a similar committee was in operation within ASCAP during his previous administration as ASCAP prexy around four years ago. While having no legislative authority, the writers' committee came up with several suggestions that got favorable reaction from the board.

It's figured if the ASCAP administration can provide a workable forum for the dissidents, all the essential problems in the organization could be solved internally without recourse to judicial intervention.

[fol. 942]

EXHIBIT "P"

December 4, 1959

Sidney Rothstein, Esq.
350 Broadway
New York 13, N. Y.

Re: U.S. v. ASCAP

Dear Mr. Rothstein:

Enclosed is the Society's check in the amount of \$720.53 for expenses incurred in connection with the mailing which was completed on November 24, 1959.

Sincerely yours,

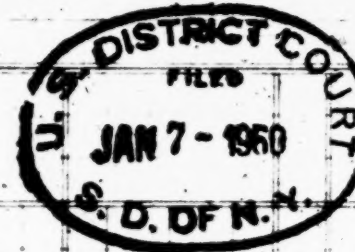
Herman Finkelstein

HF:H

enc.

cc Mr. Cheyette

Summary of ASCAP Balloting

By CL

GROUP

WRITER MEMBERS

a	Non-participating members
b	Participating members with one vote
c	" " " 2 to 5 votes
d	" " " 6 to 25 votes
e	" " " 26 to 50 votes
f	" " " 51 to 100 votes
g	" " " 101 to 250 votes
h	" " " over 250 votes

TOTALS

Total of writer members voting "YES"
 Total of writer members eligible votes
 Percentage of writer members voting "YES"
 One-half of percentage of writer members voting "YES"

"YES" VOTES		"NO" VOTES	
# of Ballots	# of Votes	# of Ballots	# of Votes
334	335	207	207
501	501	362	362
321	1040	200	62
569	710 1/2	235	283
258	9485	83	304
274	19828	67	462
304	48563	74	1152
419	318151	57	315
2974	405010 1/2	1285	547

465 010 1/2
 495 411
 81.75%
 40.88%

PUBLISHER MEMBERS:

aa	With one vote
bb	" 2 to 3 votes
cc	" 4 to 5 "
dd	" 6 to 10 "
ee	" 11 to 20 "
ff	" over 20 "

TOTALS

Total of publisher members voting "YES"
 Total of publisher members eligible votes
 Percentage of publisher members voting "YES"
 One-half of percentage of publisher members voting "YES"

424	424	331	3
53	126	37	
25	114	14	
40	305	17	
22	486	16	2
79	17596	25	20
657	19051	440	28

19051
 22598
 84.30%
 42.15%

By Clarence U. Mapp

"YES" VOTES		"NO" VOTES		"BLANK BALLOTS"	
# of Ballots	# of Votes	# of Ballots	# of Votes	# of Ballots	# of Votes
334	335	207	207	2	2
501	501	362	362	5	5
321	1040	200	621	3	10
569	710 1/2	235	2837	4	28
258	9485	83	3048	5	195
274	19828	67	4645	2	182
304	48563	74	11550	2	274
119	318 151	57	31505	4	2923
2977	405010 1/2	1285	54775	27	5619
424	424	331	331	12	12
53	126	37	90		
25	114	14	59	4	9
10	305	17	123	1	7
22	486	16	242		
79	17596	25	2003	1	
657	19051	440	2848	18	67

[fol. 957]

COURT'S EXHIBIT "K"

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
Civil Action No. 13-95

UNITED STATES OF AMERICA,

Plaintiff,

—v.—

AMERICAN SOCIETY OF COMPOSERS,
AUTHORS AND PUBLISHERS,

Defendant.

THIS IS TO CERTIFY that the American Society of Composers, Authors and Publishers (hereinafter "the Society") has submitted to its membership all portions of the proposed consent further amended Final Judgment attached to the order of this Court signed by Chief Judge Sylvester J. Ryan and dated June 29th, 1959, as to which the consent of the membership is required by the Articles of Association of the Society, and that the Board of Directors of the Society has recommended to said members that said consent be given.

THIS IS FURTHER TO CERTIFY that the required consent has been given.

This statement is made pursuant to Article VII of said proposed consent further amended Final Judgment.

Dated January 6, 1960.

AMERICAN SOCIETY OF COMPOSERS,
AUTHORS AND PUBLISHERS

By /s/ STANLEY ADAMS
Stanley Adams
President.

[fol. 958]

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
Civil Action No. 13-95

UNITED STATES OF AMERICA, Plaintiff,

—v.—

AMERICAN SOCIETY OF COMPOSERS,
AUTHORS AND PUBLISHERS, Defendant.

ORDER ADMITTING THAT ARTICLE VII OF THE PROPOSED CONSENT ORDER HAS BEEN COMPLIED WITH AND EFFECTIVE DATE OF SAID CONSENT ORDER IS JANUARY-7, 1960, ENTERED JANUARY 7, 1960

The defendant American Society of Composers, Authors and Publishers (hereinafter "the Society") having conducted, pursuant to the direction of the Court, an election in which the members of the Society voted on whether or not to approve the proposed Consent Order further amending the Amended Final Judgment entered herein on March 14, 1950, and to adopt the amendments to the Society's Articles of Association required by said proposed Consent Order; and

The ballots having been tabulated in open court on January 6, 1960, and the Court having found that the result of the balloting was as follows:

Of the total eligible votes of writer members, weighted in accordance with the Society's present Articles of Association, 81.75% of the votes were cast in favor of approving said proposed Consent Order and said amendments to the Society's Articles of Association.

Of the total eligible votes of publisher members, weighted in accordance with the Society's present Articles of Association, 84.30% of the votes were cast in favor of [fol. 959] approving said proposed Consent Order and

said amendments to the Society's Articles of Association;

Averaging these two results as provided in said Articles of Association, this represents 83.03%, which is more than is required by said Articles of Association to amend said Articles of Association;

and

The Court having found that, of the members actually voting, 2,977 writer members and 652 publisher members voted in favor of said proposed Consent Order and said amendments to said Articles of Association, with 1,285 writer members and 440 publisher members voting against; and

After reading the statement of American Society of Composers, Authors and Publishers, by Stanley Adams, President, dated January 6, 1960 and filed January 7, 1960, certifying that the Society has submitted to its membership all portions of said proposed Consent Order as to which the consent of the members is required by the Articles of Association of the Society, and that the required consent has been given; it is hereby

Ordered that Article VII of said proposed Consent Order has been complied with, and that therefore the effective date of said Consent Order is January 7, 1960.

Dated January 7, 1960.

Sylvester J. Ryan, Chief Judge.

[fol. 960]

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
Civil Action No. 13-95

UNITED STATES OF AMERICA, Plaintiff,

—v.—

AMERICAN SOCIETY OF COMPOSERS,
AUTHORS AND PUBLISHERS, et al, Defendants.

CONSENT AND ORDER AMENDING PROPOSED FURTHER AMENDED
FINAL JUDGMENT ATTACHED TO SHOW CAUSE ORDER
DATED JUNE 29, 1959, ENTERED JANUARY 7, 1960

Upon the annexed consent of the parties hereto, it is hereby

Ordered that the proposed consent further amended Final Judgment attached to the order to show cause herein signed by Chief Judge Sylvester J. Ryan and dated June 29, 1959, is hereby amended by

1. deleting the words "one year" in the first line of subsection (D) of Section V and substituting therefor the words "six months";
2. deleting the years "1959", "1958", "1959", "1960", "1961", and "1962", respectively, in paragraphs (b) and (c) of Attachment A thereto and substituting therefor the years "1960", "1959", "1960", "1961", "1962", and "1963", respectively;
3. deleting the date "September 30, 1959" in the heading of Attachment B thereto and substituting therefor the date "September 30, 1960";
4. deleting the phrases "October 1959—55%" and "October 1959—15%" where they appear in Plan I of attachment B thereto;

- [fol. 961] 5. deleting the date "September 30, 1959" in the heading of Attachment C thereto and substituting therefor the date "March 31, 1960"; and it is further

Ordered that the document entitled "Writers' Distribution Formula" submitted with the proposed consent further amended Final Judgment is hereby amended by

1. deleting the date "September 30, 1959" in the heading and substituting therefor the date "September 30, 1960"; and

2. deleting the years "1959", "1958", "1959", "1960", "1961", "1962", and "1960", respectively, from paragraph (2) of subsection (c) of Section II thereof and substituting therefor the years "1960", "1959", "1960", "1961", "1962", "1963", and "1961", respectively; and it is further

Ordered that the document entitled "Weighting Formula" submitted with the proposed consent further amended Final Judgment is hereby amended by deleting the date "September 30, 1959" in the heading and substituting therefor the date "March 31, 1960".

Dated: January 7th, 1960.

Sylvester J. Ryan, Chief Judge.

We hereby consent to the making and entry of the above order.

Richard B. O'Donnell, Attorney for Plaintiff.

Arthur H. Dean, Attorney for Defendant American Society of Composers, Authors and Publishers.

[fol. 962]

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
Civil Action No. 13-95

UNITED STATES OF AMERICA, Plaintiff,

—v.—

AMERICAN SOCIETY OF COMPOSERS,
AUTHORS AND PUBLISHERS, Defendant,

ORDER APPOINTING THE HON. JOHN E. MCGEEHAN AND THE
HON. IRVING M. IVES TO EXAMINE THE SURVEY, ENTERED
JANUARY 7, 1960

The Court having this day signed a Consent Order further amending the amended final judgment herein of March 14, 1950; and

Said Consent Order providing in Section II, Subsection (C):

(C) The Court, after hearing the recommendation of the plaintiff and the views of the defendant, shall appoint a qualified independent person, not an employee of either of the parties, who periodically as is necessary shall examine the design and conduct of the survey, make estimates of the accuracy of the samples, and report thereon to the Court and the parties. ASCAP shall pay the salary and reasonable expenses of such person."

; and

The Court having heard the recommendations of the plaintiff and the views of the defendant, it is hereby

Ordered that the Honorable John E. McGeehan and Honorable Irving M. Ives, each of whom is a qualified, independent person and not an employee of either of the parties, are hereby appointed to examine, periodically as is necessary, the design and conduct of the survey provided for in said Section II of said Consent Order, to make esti-

mates of the accuracy of the samples, and to report thereon to the Court and the parties; and it is further

Ordered that American Society of Composers, Authors and Publishers shall pay the salaries and reasonable expenses of said persons, the salaries to be fixed by the Court upon application of said persons or of the defendant American Society of Composers, Authors and Publishers.

Dated January 7th, 1960.

Sylvester J. Ryan, Chief Judge.

[fol. 964]

Civ. 13-95

UNITED STATES OF AMERICA

vs.

AMERICAN SOCIETY OF COMPOSERS, AUTHORS AND PUBLISHERS

Before: Hon. Sylvester J. Ryan, Chief Judge.

Appearances: William D. Kilgore, Jr., Alfred Karsted, John L. Wilson, Richard B. O'Donnell and Walter K. Bennett for plaintiff.

Arthur H. Dean, Howard T. Milman, Herman Finkelstein, Lloyd N. Cutler, Ferdinand Pecora, David H. Horowitz, and Frederick A. Terry, Jr. for defendants.

Lee V. Eastman, Herbert Chéyette, Charles Horsky, Alvin Friedman, Arthur L. Fishbein, Sidney W. Rothstein, Morton Schaeffer, Leonard Zissu, Edward Niles, and Bernard Kaufman, appearing as counsel for various members of defendant as amici curiae, and Edgar Battle, Bob A. Davis and Perry Bradford members of defendant appearing pro se as amici curiae.

OPINION—January 7, 1960

[fol. 965] SYLVESTER J. RYAN, Chief Judge:

The Government, with the consent of defendant ASCAP, moved on June 29, 1959, for an order further amending the

amended final consent judgment entered on March 14, 1950 (which had amended the final consent judgment of March 4, 1941). This motion came on to be heard on October 19, 1959; all the members of ASCAP had been duly served as directed by order of the Court with a copy of the proposed amended final judgment, and the Government and those members of ASCAP who made application were heard either in person or by attorney in support of and in opposition to the motion, as "friends of the Court."

The proposed final judgment resulted from extended negotiations between the Government and ASCAP following an investigation by the Justice Department of complaints from the various members of ASCAP that the antitrust purposes of the 1950 amended consent judgment were not being served.

Although ASCAP does not admit any of the Government's allegations, it was found and agreed by the parties during these discussions that existing practices in six aspects of ASCAP's operations should be changed and that modifications and additional provisions embodied in the proposed amended consent judgment would more fully accomplish the antitrust purposes of the 1950 judgment.

Briefly, these provisions are:

(1) Under existing practice the Government claims that a resigning member receives a negligible sum from licenses of works remaining in the ASCAP repertory and nothing from future licenses on works so remaining, thus effectively denying him the right to withdraw. Section I would require ASCAP to pay a resigning member for performance of his works remaining in the ASCAP repertory by reason of continued membership of a co-writer or publisher, while permitting him to license future works to another organization and thus make it feasible for him to resign.

(2) Under Section II, a scientific objective survey is to be the basis upon which distribution of revenue to ASCAP members is to be made. This survey is designed to more accurately and properly reflect the number of performances and the revenue attributable to these performances. This is to replace what the Government charges was a rather arbitrary

TOTALS

Total of publisher members voting "YES"
 Total of publisher members eligible votes
 Percentage of publisher members voting "YES"
 One-half of percentage of publisher members voting "YES"

19051
 22598
 84.30%
 42.15%

FINAL SUMMARY OF BALLOTS

One-half of percentage of writer members voting "YES"
 One-half of percentage of publisher members voting "YES"
 Percentage of ALL members voting "YES"

40.88%
 42.15%
 83.03%

trary and unbalanced survey which gave undue emphasis to network broadcasting performances and failed otherwise [fol. 967] to distribute in proper proportion to sources of the income received. The new survey provides for a 50 percent increase in the local radio samples, and a broader random selection of the stations sampled; in addition to a survey of nightclub, dance hall and wire music system performances. Further relief may be sought by the Government in respect of this survey, and the Court as well as the parties are to be provided with the advice of two independent and impartial advisers on the operations under this survey system.

(3) Section III sets forth the most significant change in the consent judgment; it vests the power to control the distribution of the Society's revenues among its members.

The Department of Justice is of the view that in the plan of distribution in effect under the 1950 consent judgment, seniority considerations and the will of the "controlling" group are emphasized as to members, songs and performance credit averaging to such a degree that young writers and publishers are being discouraged from writing and publishing new songs. Objection is also made by the Department to the classification system and its carryover effects, [fol. 968] as being weighted too heavily in favor of the older writer members. ASCAP vigorously defends the fairness of its system and does not admit the Government's contentions, and although this section represents a compromise, it is a substantial improvement over the present methods.

The new consent judgment will provide.

(a) In distribution of revenue, an option is given members whereby they can either elect to receive distribution solely on the basis of current performance (that is 100 percent up to a certain limit which, if surpassed, would place the member within the top group of approximately 100 writer members) or under a multiple fund plan comparable to that now in effect. Under either plan, the weight given to seniority is diminished; in fact, if a writer or publisher chooses the current performance plan, seniority is not a factor in the majority of instances, while under the multiple

fund plan, it loses some of its effect because of the shorter option period and the opportunity to rise or fall more rapidly within certain of the funds.

(b) With respect to the weighting rules the new judgment sets up an entirely new system. When an ASCAP composition is performed and picked up on the survey, it is [fol. 969] given a value according to the weighting rules. The basic unit used is a performance credit and it is by increasing a member's number of performance credits that a member increases his revenue.

The great fluctuation in credit given to different songs performed in the same manner was one of the major grievances brought to the attention of the Justice Department. In the past, it was possible for credit to fluctuate as much as 1000 to 1 on the performance of different compositions as themes, jingles, background, cue or bridge music. Under the new system, this ratio has been cut in most instances to at most 10 to 1 and in isolated instances to no more than 100 to 1. The test used to qualify compositions for the 10 to 1 ratio has also been changed to allow more for the performance record of the piece and less for the discretion of the board.

(c) Foreign revenues are to be distributed according to reports received from any country yielding \$200,000 or more in revenue; formerly revenue from countries other than Canada was distributed on the basis of the English and Swedish reports only.

(4) Section IV is designed to effectuate the object of [fol. 970] Section XIII of the 1950 consent judgment "to insure a democratic administration of the affairs of ASCAP" in order that unfair advantage may not be given one group of members over their competitors within the Society. The Government alleges that at present complete control over votes and revenues is in the hands of the Board of Directors, who are a self-perpetuating body, as they are elected by those members with the greatest number of votes which number is in turn determined by the share in revenues, which is determined by rules of distribution enacted by the Board.

The alleged result is that less than 3 percent of the writer-members and less than one percent of the publisher-members have the power to elect all the directors. The proposed order, by weighting votes on the basis of performance credits rather than on ASCAP income, by limiting the number of votes and by setting up a graduated scale of performance credits, would provide for truer representation of all members.

(5) Section V—The Government claims that under present conditions, because of the complex and expensive procedure, it is just about impossible for a member to enforce [fol. 971] his right to appeal his classification. The new section provides for a direct appeal to an impartial board, for access by a member to records of his own works and that of others, and for retroactive payments and full disclosure and reports by the ASCAP to its members.

(6) Finally under Section VI, ASCAP is directed to grant qualified applicants membership without regard to prior ASCAP performance and to make public requisite qualifications.

The proposed judgment has been consented to by the attorneys for ASCAP with the unanimous approval of the Board of Directors as in their judgment accomplishing the best possible results for the Society as a whole and for its individual members. It is also the belief of the Anti-trust Division that the decree is the best that today can be devised and framed; it recommends approval by the Court without qualification.

After careful consideration by the Court of the arguments for and against the approval of this proposed consent judgment, the Court finds that although not a panacea for all the alleged ills besetting the Society, the decree does represent definite improvement over existing procedures and that it will serve to advance the antitrust purposes [fol. 972] of the Government suit and of the prior decrees. The approval of the attorneys for the Society was conditioned on the vote of the membership to amend the Articles of Association in order to make them consistent with the provisions of the proposed Order, approving or disapproving the proposed Order and authorizing the Society's

consent to it. The votes tabulated in open court are in favor of amending the Articles and adopting the proposed Order, and it is so approved by this Court.

Accordingly, the Court has determined and concluded that the proposed consent decree should be signed and will be signed by the Court.

Dated, New York, January 7, 1960

Sylvester J. Ryan, U.S.D.J.

[fol. 973]

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

Civil Action No. 13-95

UNITED STATES OF AMERICA, Plaintiff,

v.

AMERICAN SOCIETY OF COMPOSERS, AUTHORS AND
PUBLISHERS, *et al.*, Defendants.

CONSENT FURTHER AMENDED FINAL JUDGMENT—
Entered January 7, 1960.

Plaintiff having filed its Complaint herein on February 26, 1941, the parties having consented to the entry of a Civil Decree and Judgment filed March 4, 1941, and the parties having consented to the entry of an Amended Final Judgment on March 14, 1950 (hereinafter referred to as the "Judgment"),

Now, Therefore, no testimony having been taken and without trial or adjudication of any issue of fact or law herein and without admission by any party in respect of any such issue, the Court having heard the parties and upon consent of all parties hereto, it is hereby

Ordered, Adjudged and Decreed as follows:

I

In carrying out the provisions of subsection (f) of Section IV of the Judgment ASCAP shall provide that any writer or publisher member who resigns from ASCAP and [fol. 974] whose works continue to be licensed by ASCAP by reason of the continued membership of a co-writer, writer or publisher of any such works, may elect to continue receiving distribution for such works on the same basis and with the same elections as a member would have, so long as the resigning member does not license the works to any other performing rights licensing organization for performance in the United States. The Society may require a written acknowledgment from such resigning member that the works have not been so licensed. In any event, a resigning member shall receive distribution from the Society on the basis of performances made under licenses in effect at the time of the member's resignation. Anything to the contrary notwithstanding, the Society may, at its option, deny resigning members the right to receive payment on any basis other than a current performance basis as defined in Section III and "Attachments A and B" of this Order, provided that such option must be exercised as to all resigning members alike.

II

ASCAP shall carry out the provisions of Section XI of the Judgment concerning surveys of performances, as follows:

(A) ASCAP shall conduct or cause to have conducted a census and/or a scientific sample of the performances of the compositions of its members. Such census and/or scientific sample shall be made in accordance with the design made and periodically reviewed by an independent and qualified person or firm. Any such sample shall be selected randomly and shall be properly weighted by the use of sample blow-up multipliers determined by dividing the total number of hours of performance in each sampling cell being [fol. 975] sampled by the number of hours actually sampled. The depth of sample may differ among strata, sub-strata or

sampling cells, and shall be determined for each by considerations of sampling efficiency. Economic multipliers shall be applied to the results of the samples and census to reflect the dollar revenue to ASCAP of performances in the various strata. The economic multipliers will be applied to the survey findings of the sample independently and separately from sample blow-up multipliers. Furthermore, the economic multipliers to be applied to the performances estimated by the sample shall be based upon the proportion of ASCAP's dollar receipts derived from the licensees or group of licensees from which the performances emanate. For this purpose licensees (or performances) may be grouped so as to reflect differences in economic value of performances insofar as practical, taking into account the added costs and complexity of finer classifications. Economic multipliers for radio and television network broadcasts may vary systematically to reflect variation in the economic value of the audience as reflected by ASCAP's dollar revenue. In determining the revenue from radio and television network broadcasts, ASCAP may take into consideration the revenue received from affiliated station announcements adjacent to and reasonably attributable to network programs carried by the affiliate. ASCAP shall endeavor to obtain logs of performances prepared by such local radio and television stations as the surveying organization deems necessary (1) to reduce non-identifications from tape recordings of performances (an effort must be made to reduce non-identifications on any half hour of continuous programming containing more than three unidentified feature performances by requesting the station to furnish a log if available) and to supplement the survey of performances where such identification is difficult, *e.g.*, foreign language stations, good music stations, background music stations; and (2) to test and correct the accuracy of the surveys made by means of tape recordings.

[fol. 976]. (B) After eighteen months from date of entry of this Order plaintiff may seek additional relief in respect to the provisions of this Section, including the scope, size or accuracy of the survey. In any such proceeding the plaintiff need show only that the survey is not established

or is not being conducted in accordance with generally accepted principles of scientific surveying or sampling, that the economic multipliers do not adequately reflect the dollar value to ASCAP of performances in the various strata, or that the sample is not of sufficient size or accuracy to permit a reasonably accurate distribution of ASCAP's revenues on the basis of its results. In such proceeding the Court may consider the cost of such additional relief.

(C) The Court, after hearing the recommendation of the plaintiff and the views of the defendant, shall appoint a qualified independent person, not an employee of either of the parties, who periodically as is necessary shall examine the design and conduct of the survey, make estimates of the accuracy of the samples, and report thereon to the Court and the parties. ASCAP shall pay the salary and reasonable expenses of such person.

III

Defendant ASCAP shall carry out the provisions of Section XI of the Judgment concerning distribution to its members, as follows:

(A) As to ASCAP's domestic revenues, beginning with the effective date of this Order, each writer member shall be given the option of electing to receive distribution (i) on a current performance basis under Plan II as described in Part II of Attachment A or (ii) on the basis of Plan I described in Part I of Attachment A. Failure to elect shall be deemed an election to receive on the basis of Plan I. Election to receive distribution on a current performance [fol. 977] basis must be made in writing and, if delivered to ASCAP not later than 30 days after the effective date of this Order, it shall apply to distributions based on performance credits recorded during the fiscal survey year commencing October 1, 1959 and the fiscal survey years thereafter to which the election is applicable. New writer members are to be given the option to make such election within thirty days of receiving notification of the acceptance of their membership application. In addition, writer members shall have the following options:

(1) A writer member who has elected to receive distribution under Plan I shall have an annual option to cancel such election effective for credits recorded in any succeeding fiscal survey year.

(2) A writer member who has elected to receive distribution under Plan II shall at any time after two years have one option to cancel such election effective for credits recorded in the subsequent fiscal survey year; thereafter should such writer member, within the period of the next five years, again elect to return to Plan II pursuant to the option given in paragraph (1) of this subsection (A), such election shall be binding for a period of five years.

(3) All elections and cancellations of elections shall be made by written notice delivered to ASCAP not later than 30 days before the first day of the fiscal survey year during which the performance credits applicable to such election are recorded and to which such election or cancellation of election is applicable.

(B) Notwithstanding the provisions of subsection (A) above, ASCAP may promulgate a rule withholding the option to receive distribution on a current performance basis from the group of writer members, reasonably calculated not to exceed 100, having the highest average performance credits recorded in the five preceding fiscal survey years, [fol. 978] provided that, within three months after the entry of this Order, in a vote held for such purpose, such rule is approved by a majority vote of such writer members. For purposes of this paragraph, a majority vote must include both (1) the votes of a majority of the writer members who cast ballots and (2) the votes of the writer members holding a majority of all performance credits during the five latest preceding fiscal survey years for which records are available out of the total number of such performance credits held by all writer members who cast ballots.

At any time not earlier than three years after the date of entry of this Order, upon written request signed by (1) the Assistant Attorney General or (2) either 25% of the number of writer members then subject to such rule, or

25 such writer members, whichever is fewer, or (3) writer members having 25% of the performance credits in the latest available five preceding fiscal survey years out of the total number of performance credits of all writer members subject to such rule, a new vote shall be held to determine whether a majority, as defined above, of the group of writer members subject to such rule adhere to the determination that no current performance option should be available to such group, provided that nothing contained herein shall require ASCAP to hold such a vote upon a request by members more frequently than once every three years.

For purposes of this subsection (B), all successors of a deceased writer member shall be regarded as a single writer member, and the vote or request of the successors holding a majority interest shall be deemed to be the vote or request of such single writer member; in case no affirmative or negative vote or no request is received from the successors holding a majority interest, such single writer member shall be disregarded for purposes of all votes or requests under this subsection.

(C) Each publisher member shall be given the option of electing to receive distribution on a current performance [fol. 979] basis as set forth in subsection (D) below and in Plan II of the "Publishers' Distribution Formula," which is attached hereto and marked "Attachment B," or on the basis of Plan I of such "Publishers' Distribution Formula." Failure to elect shall be deemed an election to receive distribution on the basis of Plan I. Election to receive distribution under Plan II must be made in writing and delivered to ASCAP not later than 30 days before the first day of any fiscal survey year and shall apply to distributions based on performance credits recorded during said fiscal survey year and subsequent years, except that an election applicable to the fiscal survey year starting October 1, 1959 may be made not later than 30 days after the effective date of this Order. Any publisher member who has elected to receive distribution under Plan I shall thereafter have the option of electing to receive distribution under Plan II by written notice delivered to ASCAP not later than 30 days before the first day of any fiscal survey year and said pub-

lisher member's distribution thereafter shall be based on performance credits recorded during the following fiscal survey year and subsequent years. New publisher members are to be given the option to make such election within 30 days after receiving notification of the acceptance of their membership applications.

(D) Any publisher member electing to receive distribution on a current performance basis shall receive distribution (based on the performance credits recorded during fiscal survey years following his election) equal to the following percentages of what such publisher would have received if all publisher distributions for the same survey period had been made on a current performance basis:

Performances recorded during the fiscal survey year commencing October 1, 1959	75%
Performances recorded during the fiscal survey year commencing October 1, 1960	80%
[fol. 980] Performances recorded during the fiscal survey year commencing October 1, 1961	85%
Performances recorded during the fiscal survey year commencing October 1, 1962	90%
Performances recorded during the fiscal survey year commencing October 1, 1963	95%
Performances recorded during the fiscal survey year commencing October 1, 1964 and subse- quent years	100%

(E) As to the revenue received by ASCAP from foreign sources, ASCAP shall make distribution to its writer and publisher members on a current performance basis. If the revenue from any source exceeds \$200,000 per annum and to the extent that the reports furnished to ASCAP by such source allocate credit in reasonably identifiable form separately by compositions performed and indicate the members in interest, such distribution shall be made on the basis of performances of the compositions of its members as reported by such foreign source; otherwise, such distribution shall be made on the basis of the most reliable information ASCAP has as to foreign performances generally.

(F) ASCAP shall not promulgate any rules making distinctions as to the amount of credit given to various works or performances except as set forth in the "Weighting Rules" attached hereto and marked "Attachment C":

(G) ASCAP shall grant no performance credits to any member for performances of compositions occurring after they are in the public domain, provided, however, that ASCAP may grant performance credits to either a publisher member or a writer member, or both, for performances of copyrighted arrangements of public domain works where the recipient of the performance credit holds a valid existing copyright covering said arrangement.

[fol. 981]

IV

ASCAP shall carry out the provisions of subsections (A) and (B) of Section XIII of the Judgment concerning the number of votes which each member may cast for the election of directors, or for the amendment of the Society's Articles of Association, as follows:

(A) If ASCAP chooses to weight the votes of its members it shall do so on the basis of the current performance credits received by each member in the latest available fiscal survey year preceding each election and in the manner set forth in subsection (B) below, with the proviso that no member shall have more than 100 votes. A member receiving no performance credits during the preceding fiscal survey year need not receive any votes whatsoever.

(B) The votes of each member shall be calculated in accordance with the following formulae, subject to the limitation that no member shall have more than 100 votes:

(1) *Writer Members*: Each writer member who has received any performance credits in the latest available preceding fiscal survey year shall have one vote, plus (i) one vote for each 1,000 credits up to 20,000 credits, plus (ii) one vote for each 2,000 credits from 20,001 to 26,000 credits, plus (iii) one vote for each 3,000 credits from 26,001 to 35,000 credits, plus (iv) one vote for each 4,000 credits from 35,001 to 51,000 credits, plus

(v) one vote for each 5,000 credits from 51,001 to 101,000, plus (vi) one vote for each 6,000 credits in excess of 101,000 credits.

(2) *Publisher Members*: Each publisher member who has received any performance credits in the latest available preceding fiscal survey year shall have one vote, plus (i) one vote for each 4,000 credits up to 100,000 credits, plus (ii) one vote for each 8,000 credits [fol. 982] from 100,001 credits to 140,000 credits, plus (iii) one vote for each 12,000 credits from 140,001 to 200,000 credits, plus (iv) one vote for each 16,000 credits from 200,001 to 408,000, plus (v) one vote for each 20,000 credits in excess of 408,000 credits.

The above formulae shall be kept current in the following manner. The number of writer and publisher performance credits respectively yielded by the ASCAP survey ended September 30, 1958 shall be calculated. This number shall be divided into the number of writer and publisher performance credits respectively yielded by the survey in the latest available fiscal survey year preceding the election in question. The resulting figures, rounded to the nearest tenth, for the writer members and publisher members respectively, shall be used as multipliers on each of the numbers above which is underlined.

(C) If at any time there is an increase of more than 10% in the percentage of the total publisher votes represented by the ten publisher members and "groups of affiliated publisher members" (as that term is used in ASCAP's Articles of Association in force on the date of this Order) having the highest number of publisher votes, the weighting of votes as set forth in subsection (B) above shall be changed to bring such publishers within 10% of such percentage, in default of which the Court shall on application of the plaintiff make an appropriate order to accomplish that result.

(D) In any election for the Board of Directors the nominees for directors shall include, in addition to those nominees chosen by any ASCAP committee or board, any per-

son eligible to be a director who is designated by a petition subscribed to by 25 or more of the members of ASCAP entitled to elect such director.

[fol. 983] (E) Any group of writer members entitled to cast one-twelfth of the votes of all ASCAP writer members, or any group of publisher members entitled to cast one-twelfth of the votes of all publisher members, shall be allowed to elect any eligible person a director by signing a petition and presenting such petition to ASCAP at least 90 days before the date of any scheduled election for the directors of the ASCAP Board. In such event, the number of directors to be elected in the general election shall be reduced by the number of directors so elected by petition, and all ASCAP members signing such petitions shall not be entitled to vote in the general election or to sign more than one petition in advance of any general election.

(F) An election of directors shall be held within one year after the effective date of this Order. All directors shall be elected at the same time and the number of directors shall not be less than 24.

V

Defendant ASCAP shall carry out the provisions of subsections (B), (C) and (D) of Section XIII of the Judgment, as follows:

(A) Defendant ASCAP shall supply to each member a copy of this Order and attachments hereto together with any rule or regulation hereinafter promulgated which in any way affects the member's voting rights and rights in the ASCAP distribution.

(B) A list of all members and their mailing addresses shall be maintained and kept current by ASCAP and at the written request of any member, who has been a member for at least one year, shall be made available for inspection and copying during regular office hours by such member or any authorized representative of such member, [fol. 984] provided, however, that if any member instructs ASCAP in writing not to make his address available,

ASCAP shall not be required to permit inspection of such address but will forward to such member unopened any mail addressed to such member in care of ASCAP.

(C) ASCAP shall within nine months after the end of each fiscal survey year prepare alphabetical lists of all compositions which received performance credits during said year, showing the number of credits received by each composition. In addition, ASCAP shall maintain records showing, for each composition which received performance credits as a theme or as background, cue or bridge music during said fiscal survey year, the number of feature performance credits received by said composition during the preceding five fiscal survey years. Any member or his authorized agent may inspect such lists and records with respect to his own compositions, and other portions of such lists and records shall be available for further inspection by any member or his authorized agent to the extent that such inspection is sought in good faith in connection with any financial interest of such member as a member. All other records of the Society relating to the distribution by ASCAP to its members shall be open for inspection by any member or his authorized agent, for good cause, provided that such member shall have been a member of ASCAP for at least one year prior to his request for such inspection.

(D) ASCAP shall, within six months after the entry of this Order, establish a special board, elected in the same manner as are the members of the Board of Directors, which shall have jurisdiction in the first instance over every complaint by a member relating to the distribution of ASCAP's revenues to such member or to any rule or regulation of the Society directly affecting the distribution of the Society's revenues to such member. Such complaint must be filed by the aggrieved member within nine months of the receipt by him of his annual statement or of the rule [fol. 985] or regulation on which such complaint is founded and the relief which the special board may grant in terms of monetary payment shall not extend back beyond the period of time covered by such annual statement, provided, however, that if the alleged injustice was such that the aggrieved party would not reasonably be put on notice of

it by his annual statement, the relief given may reach back as far as, in the opinion of the special board, is required to do justice to all parties. The special board shall set forth in detail its findings of fact and the grounds of its decision. Each member shall have a direct right of appeal from any decision made by such board to an impartial panel of the American Arbitration Association. In any appeal to such impartial panel from an adverse decision by such board, the appellant may seek to have the order, rule or regulation involved properly interpreted or applied, to have errors rectified, or to void such rule or regulation on grounds of its discriminatory or arbitrary character. Any additional amounts finally determined by the decision of such board (or, in the case of any appeal, by such panel) to be due to a member with respect to the distribution complained of by such member and all subsequent distributions to the date of the decision shall be paid to the member promptly after the rendering of such decision.

(E) Stenographic transcripts of each proceeding before the special board shall at the request of any member be supplied by ASCAP at cost. If the Society itself requires or makes any use of the transcript, the member shall pay only the cost of making a second copy. ASCAP shall without cost make available to any member at his request copies of the final decisions of such board or panel, and periodically furnish summaries of all final decisions to all members.

VI

In regard to the provisions of Section XV of the Judgment:

[fol. 986] (A) In the event that any person whose application for membership has previously been denied between March 14, 1950 and the date of this Order shall within one year after the date of first publication pursuant to subsection (B) hereof request reconsideration of his application or shall submit a new application for membership, ASCAP shall reconsider such application and if, upon such reconsideration, ASCAP shall determine that such person meets the requirement set forth in Section XV of the Judgment.

ASCAP shall forthwith admit such person to membership, non-participating or otherwise, retroactively to the date of the original application or March 14, 1950, whichever is later, provided that (1) such person shall be found to have met the applicable requirements for membership at the time of such original application and (2) such person shall not in the interim have granted to any other person or organization the right to license public performances in the United States, of any of such person's copyrighted musical compositions upon which his qualification for membership is based.

(B) Defendant ASCAP shall, in each year following the entry of this Order, issue a public statement and cause the same to be published on two separate occasions in *Variety* and *Billboard*, stating that it will accept as members all applicants meeting the requirements set forth in Section XV of the Judgment.

(C) Where an applicant for membership meets the requirements set forth in Section XV of the Judgment, ASCAP shall not refuse membership to such applicant on the ground that the ASCAP survey has failed to record any performance of the applicant's works. Where an applicant fails to meet the requirements set forth in Section XV, ASCAP shall inform the applicant specifically wherein his application fails to meet said requirements and ASCAP shall not mention whether its survey has or has not failed to record any performances of the applicant's works unless the applicant has specifically requested said information.

[fol: 987]

VII

(A) ASCAP is ordered and directed within three months after the entry of this Order to submit to its membership any portions of this Order as to which the consent of the membership is required by the Articles of Association of ASCAP, and the Board of Directors of ASCAP shall recommend to said members that said consent be given. If the required consent is given, within ten days thereafter ASCAP shall file with this Court a statement of that fact and the date of filing shall be the effective date of this Order.

(B) This Order shall be vacated without prejudice to either party if within three months from the date of entry of this Order the required consent of the membership has not been obtained as to all matters as to which such consent is required by the Articles of Association of ASCAP.

Dated: January 7th, 1960.

Sylvester J. Ryan, United States District Judge.

[fol. 988] We hereby consent to the making and entry of the foregoing order.

For the plaintiff:

William D. Kilgore, Jr., Alfred Karsted, John L. Wilson, Richard B. O'Donnell, Walter K. Bennett,
Attorneys for plaintiff.

For the defendants:

Arthur H. Dean, Howard T. Milman, Herman Finkelstein, Lloyd N. Cutler, Ferdinand Pecora, David H. Horowitz, Frederick A. Terry, Jr., Attorneys
for defendants.

[fol. 989]

ATTACHMENT A

PART I

Plan I

The following rules shall govern any distribution under Plan I referred to in subsection (A) of Section III of the Order:

(a) At least 20% of the funds distributed under such a plan shall be distributed on the basis of the individual writer member's current performance credits during the latest available preceding fiscal survey year.

(b) At least 30% of the funds distributed under such a plan shall be distributed on the basis of the individual writer member's average performance credits during the latest available preceding five fiscal

survey years. ASCAP may, however, limit the rise in such payments for one year by not more than one-half of any increase for any writer member; ASCAP may limit any fall in such payments by assigning one-third of the fall in the first year, another third in the second year, and the remaining third in the third year, except that if a writer member's average performance points as calculated for October 1960 are less than his sustained performance points as calculated for October 1959, ASCAP may limit the applicable fall by assigning one-fourth of the fall in October 1960, another fourth in October 1961, another fourth in October 1962, and the remaining fourth in October 1963.

(c) Not more than 30% of the funds distributed under any such plan may be distributed on the basis of the individual writer member's average performance [fol. 990] credits attributable to performances of his "recognized works" during the latest available preceding five fiscal survey years. A "recognized work" is a composition which has received performance credits in the ASCAP survey at least four quarters prior to the quarter in which the performance occurs. ASCAP may limit the rise in such payments for one year by not more than one half of any increase for any writer member; ASCAP may limit any fall in such payments by assigning one third of the fall in the first year, another third in the second year, and the remaining third in the third year, except that if a writer member's recognized works performance points as calculated for October 1960 are less than his availability points as calculated for October 1959, ASCAP may limit the applicable fall by assigning one fourth of the fall in October 1960, another fourth in October 1961, another fourth in October 1962, and the remaining fourth in October 1963.

(d) Not more than 20% of the funds distributed under such a plan may be distributed on a basis of the individual writer member's five-year average performance credits multiplied by his length of membership.

in ASCAP. No writer member may be given credit for more than 42 years of membership.

(e) In computing the five-year averages called for in paragraphs (b) and (c) hereof, performance credits recorded during years when the member received payment on a current performance basis shall not be considered. In computing a member's length of membership in the Society for purposes of any payments made under the provisions of paragraph (d) hereof, the number of years during which the member received payment on a current performance basis shall be subtracted from the number of years he has actually been a member of the Society.

[fol. 991]. (f) Paragraphs (b), (c) and (d) above need not apply to ~~the~~ not more than approximately 100 writer members with the highest five-year average performance credits in the Society referred to in subsection (B) of Section III of the Order. This exemption shall apply if the rules substituted therefor will have the effect of such writer members' receiving as a group substantially less money per performance credit than they would if paid on the basis of current performance credits.

[fol. 992]

PART II

Plan II: Current Performance Option

The following rules shall govern the current performance option referred to in subsection (A) of Section III of the Order:

(a) For any fiscal survey year covered by an election to receive distribution under the current performance option, an electing writer member shall receive, for his current performance credits up to 39,000 (or such higher number as ASCAP shall determine from time to time but not less than the five-year average performance credits of the writer member with the lowest such average of those writer members covered by subsection (B) of Section III of the Order) a distribution which

bears the same relationship to the total distributable writers' share of ASCAP's revenue as such performance credits in such fiscal survey year bear to the total performance credits of all ASCAP writer members for that year.

(b) For all credits in excess of such number of such writer member for such year, he shall receive distribution under the rules of Plan I described in Part I hereof, provided, however, that if an option to elect to receive distribution under this Plan II is not withheld pursuant to subsection (B) of Section III of the Order from the approximately 100 writer members with the highest five-year average performance credits, he shall receive the same distribution for each credit in excess of such number as he receives for each credit up to such number.

[fol. 99]

PART III

Before making the calculations referred to in Parts I and II above, ASCAP may first deduct an amount not exceeding 5% of the total distributable writers' share of ASCAP's revenue for the purpose of making special awards to writer members whose works have a unique prestige value for which adequate compensation would not otherwise be received by such writer members, and to writer members whose works are substantially performed in media not surveyed by ASCAP. 30 days prior to payment of any such awards, ASCAP shall send to all of its writer members a list of all recipients of such awards and the amount awarded to each.

PART IV

The Writers' Distribution Formula submitted herewith shall be deemed initially to comply with the provisions of Section III of the Order and this Attachment A, and may not be amended without 30 days' prior written notice to the plaintiff.

PUBLISHERS' DISTRIBUTION FORMULA

(Effective for distributions after September 30, 1960)

Plan I

The publishers' distributable revenue for each fiscal distribution year shall be computed for each calendar quarter and distributed quarterly. The total distributable revenue for the quarter (after deducting distributions to members exercising the current performance election provided in Plan II hereof) shall be divided into the three following funds:

I. Current Performance Fund (55% of the total);

II. Recognized Works Performance Fund (30% of the total);

III. Membership Continuity Fund (15% of the total);

except that the percentage of distributable revenue in the Current Performance Fund shall increase as follows: For the four quarterly distributions beginning with the distribution in

October 1960	—	58%
October 1961	—	61%
October 1962	—	64%
October 1963	—	67%
October 1964	—	70%

[fol. 995] and the percentage of distributable revenues in the Membership Continuity Fund shall decrease as follows: For the four quarterly distributions beginning with the distribution in

October 1960	—	12%
October 1961	—	9%
October 1962	—	6%
October 1963	—	3%
October 1964	—	0%

Each of the funds shall be distributed in accordance with the following rules:

I. Current Performance Fund

(A) Distributions from this fund for each fiscal distribution year for this fund shall be made on the basis of performance credits recorded for the applicable fiscal survey year. During such fiscal distribution year, quarterly distributions on account shall be made based on the performance credits recorded for the quarters of such fiscal survey year for which computations are available. Such quarterly distributions on account shall be made and adjusted as provided below.

(B) The distribution for the first quarter of the fiscal distribution year shall be computed by dividing the total distributable revenue for such quarter by the total performance credits received during the October-December quarter of the applicable fiscal survey year by publishers receiving distributions pursuant to this Plan I hereof, with the result being the value of a performance credit. Each publisher shall receive an amount equal to the number of performance [fol. 996] credits of such publisher in such October-December quarter, multiplied by the value of a performance credit.

(C) The distribution for the second quarter of the fiscal distribution year shall be computed in the same manner, except that the computations shall be based on the cumulative six-month total distributable revenue for the first and second quarters and on the cumulative six-month performance credits for the October-December and January-March quarters of the applicable fiscal survey year, with the amount payable to each publisher to be adjusted by deducting the amount previously paid to such publisher on account for such fiscal distribution year.

(D) The distribution for the third quarter shall be computed in the same manner, except that nine-month cumulative totals will be used.

(E) The distribution for the fourth quarter shall be computed in the same manner, except that twelve-month cumulative totals will be used.

II. *Recognized Works Performance Fund*

(A) Distribution to each publisher from this fund shall be based on the number of performance credits received by such publisher for performances of recognized works during the applicable fiscal survey year. "Recognized works" are defined as works which are performed at any time after the expiration of four quarters commencing with the quarter in which a performance of such work shall have first been recorded in the Society's survey.

(B) The amount to be distributed to each publisher from the Recognized Works Performance Fund for any quarter shall be an amount equal to such publisher's performance credits attributable to performances of recognized works, [fol. 997] as calculated in accordance with the foregoing provisions, multiplied by the cash value of such a performance credit. The cash value of such a performance credit shall be computed by dividing the dollar amount of the Recognized Works Performance Fund for such quarter by the aggregate number of such performance credits of all publishers receiving distribution pursuant to this Plan I hereof.

III. *Membership Continuity Fund*

(A) Distributions to each publisher from this fund shall be based upon the number of continuity points of such publisher, determined by multiplying (1) the number of quarters of such publisher's membership in the Society by (2) the performance credits received by such publisher during the applicable fiscal survey year.

(B) The amount to be distributed to each publisher from the Membership Continuity Fund for any quarter shall be an amount equal to the continuity points of such publisher, multiplied by the cash value of a continuity point. The cash value of a continuity point shall be computed by dividing the dollar amount of the Membership Continuity Fund for such quarter by the aggregate number of continuity points of all publishers receiving distribution pursuant to this Plan I hereof.

PLAN II

Current Performance Election

In lieu of participating in the foregoing plan of publisher distribution, any publisher member may elect to receive distribution on a current performance basis. Any such election must be made in writing and delivered to ASCAP at least thirty days before the beginning of a fiscal survey year, and shall apply to all distributions [fol. 998] based upon performance credits recorded in such year and subsequent years, except that an election applicable to the fiscal survey year starting October 1, 1959 may be made not later than 30 days after the effective date of this Order, and except that an election by a new publisher member within 30 days after being notified of the acceptance of its membership application shall apply from the date it became a member.

An election covering the following years shall entitle the electing publisher member to the following distribution:

For the fiscal survey year starting:

Oct. 1, 1959 the publisher shall receive	75%
Oct. 1, 1960 the publisher shall receive	80%
Oct. 1, 1961 the publisher shall receive	85%
Oct. 1, 1962 the publisher shall receive	90%
Oct. 1, 1963 the publisher shall receive	95%
Oct. 1, 1964 and thereafter for succeeding fiscal survey years the publisher shall receive	100%

of what such publisher member would have received if all publisher distributions for that year had been made on a current performance basis.

A publisher member may make such election applicable beginning with the fiscal survey year starting October 1, 1959 or beginning with any subsequent fiscal survey year.

RESIGNING MEMBERS

(Applicable to both Plan I and Plan II)

If, in the case of a resigning publisher member, the Society shall continue to have the right to license the per-

forming rights in the United States to a work or works of [fol. 999] such publisher as a result of continued membership in the Society of one or more of the members in interest with respect to such work or works, and if no other performing rights licensing organization has any such right, distributions shall continue to be made to such resigning member subsequent to his resignation from the Society—for so long as the Society retains such licensing right, and no other performing rights licensing organization has any such right—on the basis of performance credits recorded for such work or works. The Society may require such resigning member to acknowledge that the Society retains such right and that no other performing rights licensing organization has any such right. In the event such resigning member fails so to acknowledge, such resigning member shall not be entitled to any payment pursuant to these provisions. Anything to the contrary notwithstanding, the Society may, at its option, deny resigning publisher members the right to receive payment on any basis other than a current performance basis as provided in Plan II above, provided that such option shall be exercised as to all resigning publisher members alike.

With respect to all other works of the resigning publisher member, distributions shall continue to be made to such resigning member subsequent to his resignation from the Society on the following basis:

(1) An amount shall be calculated as to each of the three distribution funds (or pursuant to Plan II, if applicable) based on performance credits recorded for such works, such amount to be calculated in all respects in accordance with the provisions hereinbefore set forth;

(2) Such amount as to each fund (or computed pursuant to Plan II) shall be separated into two portions, the first of which shall bear the same ratio to the entire amount as the sum of radio and television revenues [fol. 1000] received by the Society bears to the aggregate of all revenues received by the Society during the preceding fiscal year, and the second of which shall bear the same ratio to the entire amount as the sum of reve-

revenues received by the Society from sources other than radio and television bears to the aggregate of all revenues received by the Society during the preceding fiscal year;

(3) The first portion shall, as to each fund (or as computed pursuant to Plan II), be distributed to such resigning member on the basis of performances made under radio and television licenses made prior to the resignation of such member;

(4) The second portion shall, as to each fund (or as computed pursuant to Plan II), be distributed for four quarterly distributions after the resignation of such member (and not thereafter), the first such distribution to be equal to the full amount of such portion, the second such distribution to be equal to 75% of such portion, the third such distribution to be equal to 50% of such portion, and the fourth such distribution to be equal to 25% of such portion.

[fol. 1001]

ATTACHMENT C

WEIGHTING RULES

(Effective for performances after March 31, 1960)

In awarding credit for a performance appearing in the Society's survey, no distinction shall be made on the basis of the identity or use of the work performed, except as provided in these Weighting Rules.

(A) As used in these Weighting Rules:

(1) "*Theme*" shall mean a musical work used as an identifying signature of a radio or television personality or of all or part of a radio or television program or series of programs. A musical work (other than a jingle) used in conjunction with a commercial announcement shall receive the same credit as a theme.

(2) "*Background Music*" shall mean mood, atmosphere or thematic music performed as background to some non-musical subject matter being presented on a radio or television program. A vocal or a visual in-

strumental rendition of a work on any medium shall not be regarded as background music regardless of the context in which performed.^B

(3) "*Jingle*" shall mean a musical message containing commercial advertising matter, where (a) the musical material was originally written for commercial advertising purposes or (b) the performance is of a musical work, originally written for other purposes, with the lyrics changed for commercial advertising purposes with the permission of the ASCAP member or members in interest.

(4) "*Cue Music*" shall mean music used on a radio or television program to introduce, but not to identify, a personality or event thereon. The term "cue music" [fol. 1002] includes, but is not limited to, introductions, "play-ons" and "play-offs".

(5) "*Bridge Music*" shall mean music used on a radio or television program as a connective link between segments or portions thereof.

(6) "*Use*" shall mean a performance of a composition reported by the ASCAP survey.

(7) "*Feature Performance*" shall mean any performance other than as a theme, jingle, background music, or cue or bridge music.

(8) "*Performance Credit*" shall mean the unit of measure of the results of the survey, being derived by multiplying uses or fractional uses by the applicable sampling and economic multipliers.

(B) Each feature performance is to be awarded one use credit, except as provided herein and in subsections (D) and (E) hereof. Fractional use credit may be awarded to compositions performed as a theme or jingle or as background, cue or bridge music, or performances of copyrighted arrangements of works in the public domain.

(1) ASCAP may make distinctions in the amount of credit awarded to various works for similar uses when used as themes or as background, cue or bridge music,

provided that such distinctions shall be based solely on the number of feature performance credits received by the work prior to the fiscal survey year for which credit is to be awarded as provided in paragraph (3) below.

(2) Such distinctions for similar uses as themes or cue or bridge music shall not be of a greater ratio than 10 to 1. In the case of background music, such distinction shall not be of a greater ratio than 5 to 1 between works qualifying under paragraph (3) below and non-qualifying works which have been commercially published [fol. 1003] for general public distribution and sale, of which commercial recordings have been made as "singles" for general public distribution and sale, and five feature playings of which have been recorded in the ASCAP local radio sample survey during the five preceding fiscal survey years; other non-qualifying works when used as background music may be awarded credit on a durational basis as provided in paragraph (3) below. There shall be no distinction in the amount of credit for use of compositions as jingles.

(3) Such distinctions shall be based upon compliance with both of the following tests for maximum credit (subject to the provisions of paragraph (5) below):

(a) a number of accumulated feature performance credits (not to exceed 20,000 credits since January 1, 1943 for a fully qualifying work), and

(b) a number of feature performance credits (not to exceed 2,500) in the five latest available preceding fiscal survey years, toward which there may be a limit of not more than 30% of such number of credits to be counted in any one year.

A work performed as a theme and which complies with the requirements of subparagraph (b) of this paragraph (3) shall receive 75%, 50% or 25% of such maximum credit if it has accumulated 75%, 50% or 25%, respectively, of the number of accumulated feature performance credits required by subparagraph (a).

of this paragraph (3). A work performed as background music and which complies with the requirements of said subparagraph (b) above shall receive 50% of such maximum credit if it has accumulated 50% of the number of accumulated feature performance credits required by said subparagraph (a) above. Background music on each program receiving credit on a durational basis shall receive, for each three minutes' duration in the aggregate for that program, 20% of a use credit; fractions of three minutes shall be computed on the basis of 5% for each forty-five seconds or major fraction thereof.

(4) Until five years of records of feature performances are available, the number of feature performance credits required pursuant to subparagraph (b) of paragraph (3) above shall be reduced proportionately to the number of years available. For a work whose first surveyed performance occurred within the five latest available preceding fiscal survey years, the requirement of said subparagraph (b) shall be satisfied when the work has met the requirements of subparagraph (a) of paragraph (3) above and shall continue to be satisfied if in each subsequent year of such five years the work receives one-fifth the number of feature performance credits required by said subparagraph (b).

(5) ASCAP shall promulgate rules providing that:

(a) Any work first performed before January 1, 1943 shall satisfy the requirements of subparagraph (a) of paragraph (3) above if the title of the work appears in the publication *Variety Music Cavalcade*, Prentice-Hall 1952, or among the top ten on the "Lucky Strike Hit Parade" or the top ten on the weekly list of the most popular songs published in *Variety* or *Billboard*.

(b) If any work first performed on or after January 1, 1943 has received the number of performance credits required pursuant to subparagraph (a) of paragraph (3) above in the two consecutive fiscal

survey years commencing with the year in which its first performance is recorded in the survey, or if the title of such work appears in the publication [fol. 1005] *Variety Music Cavalcade*, Prentice-Hall 1952, or among the top ten on the "Lucky Strike Hit Parade" or the top ten on the weekly list of the most popular songs published in *Variety* or *Billboard*, there shall be a rebuttable presumption that such performance credits recorded before October 1, 1955 reflect feature performances; otherwise, the burden shall be on the member to establish that performance credits recorded before October 1, 1955 reflect feature performances.

(C) The number of performance credits needed to meet any requirement pursuant to paragraph (3) above is premised on an annual total of approximately 25,000,000 performance credits recorded in the ASCAP survey; performance credits in years when the total number of performance credits recorded in the ASCAP survey was 20% greater or smaller than that number shall be adjusted proportionately.

(D) ASCAP may promulgate rules limiting the credit to be awarded to multiple performances of the same work or aggregate performances of all works on a single program or during a period of programming or on a continuing series of the same program which is presented two or more times per week. ASCAP may make distinctions on the basis of the length of the performance or on whether it was a vocal or a visual instrumental performance.

(E) Multiple use credits may be awarded for performances of works which require four minutes or more for a single, complete rendition thereof, and such credit may be limited to certain works, *e.g.*, those which in their original form were composed for a choral, symphonic or similar concert performance (including chamber music). Performances of concerts by symphony orchestras on national radio network sustaining programs may be awarded [fol. 1006] credit equal to performances on a network of a specified number of stations (*e.g.*, 50 stations). ASCAP

may also distribute to its members, for performances of their works in concert and symphony halls, amounts in excess of the license fees it receives from such licensees (*e.g.*, five times said license fees).

(F) The Weighting Formula submitted herewith shall be deemed initially to comply with all of the provisions of the Order and this Attachment C, and may not be amended without 30 days' prior written notice to the plaintiff.

[fol. 1007] WRITERS' DISTRIBUTION FORMULA

(Effective for all distributions after September 30, 1960)

The writers' distributable revenues shall be computed for each calendar quarter, and distribution of such revenues shall be made during the month of January (or the preceding December), April, July or October, as the case may be, next following such calendar quarter. Such distribution shall be made by dividing the total distributable revenues for the quarter (after deducting distributions to members exercising the current performance election provided in Section VII hereof) into the following four funds:

- I. Current Performance Fund (20% of the total);
- II. Average Performance Fund (30% of the total);
- III. Recognized Works Performance Fund (30% of the total); and
- IV. Membership Continuity Fund (20% of the total);

and by distributing each such fund in accordance with the following rules:

I. *Current Performance Fund*

(A) Distribution to each writer member (hereinafter called "writer") from this fund shall be based on the number of performance credits of such writer recorded during the latest annual period of October 1 through September 30 for which computations are available (such period being referred to in these rules as the "latest preceding fiscal survey year").

(B) The amount to be distributed to each writer shall be equal to the number of such performance credits of such writer, multiplied by the cash value of a performance credit. The cash value of a performance credit for [fol. 1008] any calendar quarter shall be computed by dividing the dollar amount of the Current Performance Fund for such quarter by the aggregate number of performance credits of all writers receiving distribution pursuant to Sections I through IV hereof.

II. *Average Performance Fund*

(A) Distribution to each writer from this fund shall be based on the average performance credits of such writer, determined by aggregating all performance credits received by such writer during the five latest preceding fiscal survey years and dividing such aggregate by five.

(B) In October of each year, each writer shall, for purposes of determining the distribution to be made to such writer from the Average Performance Fund during the year beginning with such October, be assigned a number of average performance points determined by dividing by 40 his average performance credits, as calculated pursuant to the preceding paragraph, provided that every writer having more than 38,999 average performance credits shall be assigned average performance points as follows:

	Credits		Points
from	39,000	to	49,999
"	50,000	"	62,499
"	62,500	"	74,999
"	75,000	"	99,999
"	100,000	"	124,999
"	125,000	"	199,999
"	200,000	"	299,999
"	300,000	"	449,999
"	450,000	"	599,999
over	600,000		1500

[fol. 1009] (C) (1) In the event that a writer's average performance points, as calculated for any particular October without regard to the provisions of this subsection (C), shall exceed such writer's average performance points as calculated for the preceding October without regard to the

provisions of this subsection (C), the point increase actually assigned to such member in the particular October shall be one-half of the point increase assignable without regard to the provisions of this subsection (C), and the remaining half of such point increase shall be assigned to such writer in the next succeeding October.

(2) In the event that a writer's average performance points, as calculated for October 1960 without regard to the provisions of this subsection (C), shall be less than such writer's sustained performance points as calculated for October 1959, the point decrease actually assigned to such writer in October 1960 shall be one fourth of such difference, a second fourth of such difference shall be assigned to such writer in October 1961, a third fourth of such difference shall be assigned to such writer in October 1962 and the remaining fourth of such difference shall be assigned to such writer in October 1963. In the event that a writer's average performance points, as calculated for any particular October beginning with October 1961 without regard to the provisions of this subsection (C), shall be less than such writer's average performance points as calculated for the preceding October without regard to the provisions of this subsection (C), the point decrease actually assigned to such writer in the particular October shall be one third of such difference, a second third of such difference shall be assigned to such writer in the next succeeding October and the remaining third of such difference shall be assigned to such writer in the second succeeding October.

(3) The provisions of this subsection shall be applied cumulatively.

[fol. 1010] (4) The provisions of this subsection (C) shall not be applied to limit increases or decreases in average performance points from the preceding October to the particular October where the increase is to Class 1000 or above, or where the decrease is from Class 1000 or above to Class 975. In the event that a writer's average performance points, as calculated without regard to the provisions of this subsection (C), would be decreased from Class 1000 or above to a class below 975, the provisions of this subsection (C) shall be applied to the point difference between Class 975 and the lower class to which such writer would be as-

signed if the provisions of this subsection (C) were disregarded.

(D) The amount to be distributed to each writer from the Average Performance Fund for any quarter shall be an amount equal to such writer's average performance points, as calculated in accordance with the foregoing provisions, multiplied by the cash value of an average performance point. The cash value of an average performance point shall be computed by dividing the dollar amount of the Average Performance Fund for such quarter by the aggregate number of average performance points of all writers receiving distribution pursuant to Sections I through IV hereof.

III. *Recognized Works Performance Fund*

Distribution to each writer from this fund shall be determined in all respects in the same manner as distributions from the Average Performance Fund, except that the calculation shall be based solely on performance credits of such writer attributable to performances of recognized works; and except that "recognized works performance points" and "availability points" shall be substituted for the terms "average performance points" and "sustained performance points" where applicable. "Recognized works" are defined as works which are performed at any time after [fol. 1011] the expiration of four quarters commencing with the quarter in which a performance of such work shall first have been recorded in the Society's survey.

IV. *Membership Continuity Fund*

(A) Distribution to each writer from this fund shall be based upon the number of continuity points of such writer, determined by multiplying (1) the number of continuous quarters of such writer's membership in ASCAP, but in no event more than 168 quarters, and (2) such writer's average performance points.

(B) The amount to be distributed to each writer from the Membership Continuity Fund for any calendar quarter shall be an amount equal to the continuity points of such

writer, multiplied by the cash value of a continuity point. The cash value of a continuity point shall be computed by dividing the dollar amount of the Membership Continuity Fund for such quarter by the aggregate number of continuity points of all writers receiving distribution pursuant to Sections I through IV hereof.

V. *New Members*

In the case of a new writer member of the Society, distribution shall be calculated in accordance with the foregoing rules or in accordance with Section VII hereof, whichever is applicable, except as hereinafter provided in this Section V:

(A) For purposes of distributions to a new writer member there shall be included the two fiscal survey quarter years (plus any remaining fraction of a quarter year) prior to notification by the Society of the acceptance of his membership application to the extent that performances of his works are recorded in the Society's survey, but excluding [fol. 1012] works as to which, at the time of performance, any other performing rights organization had the right to license performances in the United States.

(B) The Society may accelerate all or part of the distributions to a new writer member for performance credits received pursuant to subsection (A) above and performance credits recorded during his first two years of membership, provided that all new writer members are treated alike.

(C) A new writer member's average performance and recognized works performance points shall be determined:

(1) For the first October in which the basis of computation of such points includes performance credits in a fiscal survey year including any part of the period of time referred to in subsection (A) above, by aggregating performance credits for that fiscal survey year and dividing by three.

(2) For the next succeeding October, by aggregating performance credits for the two latest preceding fiscal survey years and dividing by four.

(3) For the next succeeding October, by aggregating performance credits for the three latest preceding fiscal survey years and dividing by five.

(4) For the next succeeding October, by aggregating performance credits for the four latest preceding fiscal survey years and dividing by five.

(5) For the next succeeding October, by aggregating performance credits for the five latest preceding fiscal survey years and dividing by five.

VI. *Special Awards*

Notwithstanding any of the foregoing provisions, in calculating the total distributable revenues to be placed in the [fol. 1013] four funds referred to in Sections I through IV above or distributed pursuant to Section VII below, there may first be deducted an amount not exceeding 5% of such revenues prior to such deduction, for the purpose of making special awards to writers whose works have a unique prestige value for which adequate compensation would not otherwise be received by such writers, and to writers whose works are performed substantially in media not surveyed by the Society. The distribution of such awards shall be determined by an independent panel appointed for that purpose by the writer members of the Board of Directors, and 30 days prior to payment pursuant to any such awards, the Society shall send to all of its writer members a list of all recipients of such awards and the amount awarded to each.

VII. *Current Performance Election*

A writer who, at the time, is below Class 975 in either the Average Performance Fund or the Recognized Works Performance Fund, may elect to receive distributions calculated in accordance with the following provisions:

(A) For any fiscal survey year covered by such election, an electing writer shall receive, for each current performance credit up to the number which is equal to the number of five-year average performance credits of the writer with

the lowest such average in Class 975 in the Average Performance Fund (hereafter called "the current performance election maximum"), an amount equal to the cash value of the total writers' distributable revenue divided by the total number of performance credits of all writer members during such year. (Any amounts distributed under this subsection shall be deducted before dividing the total writers' distributable revenue into the Current Performance, Average Performance, Recognized Works Performance, and Membership Continuity Funds.)

[fol. 1014] (B) If an electing writer receives in any fiscal survey year covered by such election more performance credits than "the current performance election maximum" he shall be paid for credits in excess thereof under Sections I through IV hereof, provided that in computing such payment:

(1) the total number of current performance credits and credits attributable to recognized works recorded for such writer during such fiscal survey year shall be deemed to be his average performance credits and average recognized works performance credits, respectively, for purposes of determining his classifications in the Average Performance and Recognized Works Performance Funds; the provisions of subsection (C) of Section II shall be disregarded; and the resulting classifications shall be diminished by 975 points;

(2) in determining the number of continuous quarters of such writer's membership in ASCAP for purposes of the Membership Continuity Fund, such writer shall be credited with no quarters of membership for any fiscal survey year covered by his election in which such writer receives not more performance credits than "the current performance election maximum".

(C)(1) A writer who was below Class 975 in the Average Performance Fund when he elected and thereafter has more than 39,000 performance credits in any fiscal survey year, or a writer who was below Class 975 in the Recognized

Works Performance Fund when he elected and thereafter has more than 39,000 recognized works performance credits in any fiscal survey year, may (provided he gives notice to that effect within 3 months after he has been notified of the results of said fiscal survey year):

(i) cancel such election and receive distribution starting retroactively for such fiscal survey year [fol. 1015] pursuant to Sections I through IV hereof, subject to the credit or debit that may be required by recomputation of such writer's distributable revenues, or

(ii) cancel prospectively only, and thereafter receive distribution under Sections I through IV hereof, starting with the next succeeding fiscal survey year.

(2) For purposes of classification under Sections II, III and IV hereof, any writer so cancelling such election shall have his performance credits, if any, for the years next prior to those covered by such election, credited as if they were received in the years next preceding such fiscal survey year.

(3) If any writer so cancelling such election has never received distribution under Sections I through IV hereof, the provisions of Section V shall be applicable and, for the fiscal distribution year based on the fiscal survey year referred to in (i) or (ii) above, the provisions of subsection (C) of Section II shall be disregarded.

(4) For purposes of participation in the Membership Continuity Fund, the number of continuous quarters of such writer's membership shall be determined in accordance with paragraph (2) of subsection (B) above.

(D) A writer previously in Class 975 or above in both the Average Performance Fund and the Recognized Works Performance Fund, who falls into a class below 975 in either fund in any fiscal survey year, may elect to receive

distribution calculated in accordance with subsections (A) and (B) above (provided he gives notice to that effect within 3 months after he has been notified of the results of the fiscal survey year in which he first fell below Class 975 in either fund), either

[fol. 1016] (1) Retroactively, starting with the fiscal survey year in which he first fell below Class 975 in either fund, subject to the credit or debit that may be required by recomputation of such writer's distributable revenues, or

(2) Prospectively, starting with the next succeeding fiscal survey year.

(E) An election under subsection (A) above must be made in writing and shall apply to distributions based on the fiscal survey years commencing no less than 30 days after said election (except that an election by a new writer member within 30 days after being notified of the acceptance of his membership application shall apply from the date he became a member) and thereafter until cancelled by notice in writing, such notice of cancellation (except where cancellation is made under subsection (C) above) to be given not less than two years after the notice of his first such election and to be effective for distributions based on the fiscal survey years commencing at least 30 days thereafter. A writer electing and then cancelling, under either subsection (C) above or this subsection (E), and thereafter electing again within the next five years, may not cancel such election during the succeeding five years. The provisions of paragraph (2) of subsection (B) and paragraph (2) of subsection (C) shall be applicable to any writer cancelling an election pursuant to this subsection (E).

VIII. *Resigning Members*

(A) If, in the case of a resigning writer member, the Society shall continue to have the right to license the performing rights in the United States to a work or works of such writer as a result of continued membership in the

Society of one or more of the members in interest with respect to such work or works, and if no other performing [fol. 1017] rights licensing organization has any such right, distributions shall continue to be made to such resigning member subsequent to his resignation from the Society— for so long as the Society retains such licensing right, and no other performing rights licensing organization has any such right—on the basis of performance credits recorded for such work or works. The Society may require such resigning member to acknowledge that the Society retains such right and that no other performing rights licensing organization has any such right. In the event such resigning member fails so to acknowledge, such resigning member shall not be entitled to any payment pursuant to these provisions.

Anything to the contrary notwithstanding, the Society may, at its option, deny resigning writer members the right to receive payment on any basis other than a current performance basis as defined in Section VII above, provided that such option shall be exercised as to all resigning writer members alike.

(B) With respect to all other works of the resigning writer member, distributions shall continue to be made to such resigning member subsequent to his resignation from the Society on the following basis:

(1) An amount shall be calculated as to each of the four distribution funds (or pursuant to Section VII) based on performance credits recorded for such works, such amount to be calculated in all respects in accordance with the provisions hereinbefore set forth.

(2) Such amount as to each fund (or calculated pursuant to Section VII) shall be separated into two portions, the first of which shall bear the same ratio to the entire amount as the revenues received by the Society from unexpired radio and television licenses made prior to the time of such member's resignation bears to the aggregate of all revenues received by the Society [fol. 1018] during the preceding fiscal year, and the second of which shall bear the same ratio to the entire

amount as the sum of revenues received by the Society from sources other than radio and television bears to the aggregate of all-revenues received by the Society during the preceding fiscal year;

(3) The first portion shall, as to each fund (or calculated pursuant to Section VII), be distributed to such resigning member on the basis of performances made under radio and television licenses made prior to the resignation of such member;

(4) The second portion shall, as to each fund (or calculated pursuant to Section VII), be distributed for four quarterly distributions after the resignation of such member (and not thereafter), the first such distribution to be equal to the full amount of such portion, the second such distribution to be equal to 75% of such portion, the third such distribution to be equal to 50% of such portion, and the fourth such distribution to be equal to 25% of such portion.

[fol. 1019]

WEIGHTING FORMULA

(Effective for performances after March 31, 1960)

In awarding credit for a performance appearing in the Society's survey, no distinction shall be made on the basis of the identity or use of the work performed, except as provided in this Weighting Formula.

(A) As used in this Weighting Formula:

(1) "*Theme*" shall mean a musical work used as the identifying signature of a radio or television personality or of all or part of a radio or television program or series of programs. A musical work (other than a jingle) used in conjunction with a commercial announcement shall receive the same credit as a theme.

(2) "*Background Music*" shall mean mood, atmosphere or thematic music performed as background to some non-musical subject matter being presented on a radio or television program. A vocal or a visual instrumental rendition of a work on any medium shall

not be regarded as background music regardless of the context in which performed.

(3) "*Jingle*" shall mean a musical message containing commercial advertising matter, where (a) the musical material was originally written for commercial advertising purposes or (b) the performance is of a musical work, originally written for other purposes, with the lyrics changed for commercial advertising purposes with the permission of the ASCAP member or members in interest.

(4) "*Cue Music*" shall mean music used on a radio or television program to introduce, but not to identify, a personality or event thereon. The term "cue music" includes, but is not limited to, introductions, "play-ons", and "play-offs".

[fol. 1020] (5) "*Bridge Music*" shall mean music used on a radio or television program as a connective link between segments or portions thereof.

(6) "*Qualifying Work*" shall mean a work meeting both of the criteria set forth in subparagraphs (a)(i) and (a)(ii) of paragraph (C) of this Weighting Formula. A work meeting the criteria set forth in subparagraph (d) of said paragraph (C) shall also be deemed a qualifying work to the extent that it shall receive the percentage set forth in said subparagraph (d) of the use credit provided in this Weighting Formula for qualifying works.

(7) "*Non-Qualifying Work*" shall mean a work not meeting the criteria set forth in paragraph (C) of this Weighting Formula.

(8) "*Single Program*" shall mean any substantially consecutive period of broadcasting which is presented by the same dominant personality, or is presented under substantially the same title, or is presented as a single show with separate segments. If any such period of broadcasting is more than two hours in duration, each two-hour segment thereof shall be treated as a

single program, and any remaining fraction of less than two hours shall be treated as a single program.

(9) "*Use Credit*" shall mean a full credit for a single performance.

(10) "*Otherwise Applicable Credit*" shall mean the use credit or percentage of a use credit otherwise provided for in this Weighting Formula for a particular type of use of a qualifying or non-qualifying work.

(B) *Credit for Feature Performances*

(1) Each feature performance of a work (as distinguished from performance as a theme or jingle or as background, cue or bridge music) shall receive one use [fol. 1021] credit for the first performance and 10% of a use credit for each subsequent performance on a single program, provided that no work shall receive more than two use credits for a single program.

(2) In determining use credits for radio or television programs containing more than eight works per each quarter hour of programming (excluding themes, jingles, background, cue and bridge music), the use credit allotted to each work shall be reduced pro rata so that all works on the entire program shall receive in the aggregate the number of use credits which would have been allotted if the program had contained eight compositions per each quarter hour of programming (excluding themes, jingles, background, cue and bridge music).

(C) *Credit for Performances as a Theme, Background Music, or Cue or Bridge Music*

(1) *Qualifying Works:*

(a) A work complying with both of the following tests shall receive the full use credit or percentage thereof specified in this Weighting Formula for the performance of a qualifying work as a theme, background music, or cue or bridge music:

(i) an accumulation of 20,000 feature performance credits since January 1, 1943;

(ii) an accumulation of 2500 feature performance credits during the five latest available preceding fiscal survey years, toward which total not more than 750 credits shall be counted for any one of such survey years.

(b) Any work first performed before January 1, 1943 shall satisfy the requirements of subparagraph (a)(i) above, in the event such work has not accumulated 20,000 feature performance credits since such [fol. 1022] date, if the title of such work appears in the publication *Variety Music Cavalcade*, Prentice-Hall 1952, or among the top ten on the "Lucky Strike Hit Parade" or the top ten on the weekly list of the most popular songs published in *Variety* or *Billboard*.

(c) If any work first performed on or after January 1, 1943 has earned the number of performance credits required pursuant to subparagraph (a)(i) above in the two consecutive fiscal survey years commencing with the year in which its first performance is recorded in the survey, or if the title of such work appears in the publication *Variety Music Cavalcade*, Prentice-Hall 1952, or among the top ten on the "Lucky Strike Hit Parade" or the top ten on the weekly list of the most popular songs published in *Variety* or *Billboard*, there shall be a rebuttable presumption that such performance credits recorded before October 1, 1955 reflect feature performances; otherwise, the burden shall be on the member or members in interest to establish that performance credits recorded before October 1, 1955 reflect feature performances.

(d) A work performed as a theme and which complies with the requirements of subparagraph (a)(ii) above shall receive 75%, 50% or 25% of a full use credit if it has accumulated 15,000, 10,000 or 5,000 feature performance credits, respectively, since January 1, 1943. A work performed as background music and which complies with the requirements of subpara-

graph (a)(ii) above shall receive 50% of a full use credit if it has accumulated 10,000 feature performance credits since January 1, 1943.

(e) Until five years of records of feature performances are available the number of feature performance credits required pursuant to subparagraph (a)(ii) above shall be reduced proportionately to the number of years available. For a work whose first surveyed [fol. 1023] performance occurred within the five latest available preceding fiscal survey years, the requirement of said subparagraph (a)(ii) shall be satisfied when the work has met the requirements of subparagraph (a)(i) above and shall continue to be satisfied if in each subsequent year of such five years the work receives one-fifth the number of feature performance credits required by said subparagraph (a)(ii).

(f) The number of performance credits needed to meet any requirement pursuant to subparagraph (a) above is premised on an annual total of approximately 25,000,000 performance credits recorded in the ASCAP survey; performance credits in years when the total number of performance credits recorded in the ASCAP survey was 20% greater or smaller than that number shall be adjusted proportionately.

(2) *Themes:*

(a) When any qualifying work is performed as a theme, it shall receive only one use credit for all such performances within the first 60 minutes of any given two-hour period regardless of the number of actual such performances, and for all additional such performances during the second hour it shall receive only an addition 10% of a use credit regardless of the number of actual such performances.

(b) When any non-qualifying work is performed as a theme, it shall receive only 10% of a use credit for all such performances within the first 60 minutes of any given two-hour period regardless of the number of actual such performances, and for all additional

such performances during the second hour it shall receive only an additional 1% of a use credit regardless of the number of actual such performances.

[fol. 1024] (c) When during any given two-hour period, any work is performed both

(i) as a feature performance or as background music, and

(ii) as a theme,

it shall receive for its performance as a theme the percentage of use credit herein provided therefor, except that in no event shall the addition of such percentage of use credit increase the aggregate use credit for such work to more than 1-1/10 use credits for the first 60 minutes of such two-hour period, or to more than 10% of a use credit for the second hour.

(d) Anything to the contrary notwithstanding, if more than one work is performed as a theme during any quarter hour period, such works shall receive the following credit: The highest percentage of a use credit for any of such works for its performance as a theme during such period shall be shared among all such works, such sharing to be proportional to the relative percentage of a use credit which each such work would otherwise have received during that period.

(3) *Background Music and Cue and Bridge Music:*

(a) When any qualifying work is performed as background music, it shall receive one use credit for the first such performance on a single program, and shall receive only 10% of a use credit for each subsequent such performance on such program, provided that no work shall receive more than two use credits for a single program.

(b) Non-qualifying background music on each program shall receive, for each three minutes' duration in the aggregate for that program, 20% of a use credit; [fol. 1025] fractions of three minutes shall be com-

puted on the basis of 5% for each 45 seconds or major fraction thereof. To determine use credits for performances in this classification where the time of actual performance cannot be established from the information available to the Society, 40% of the net program time will be considered as containing background music and the computation of 20% will be based on such computed time. Where condensed versions of a longer program are presented and the actual music performed on this condensed version is unknown, the 40% computation will be made on the net program time and applied pro rata to all of the background works in the longer version of the program. Anything to the contrary notwithstanding, any non-qualifying work which has been commercially published for general public distribution and sale, of which a commercial recording has been made as a "single" for general public distribution and sale, and five feature playings of which have been recorded in the Society's local radio sample survey during the five preceding fiscal survey years, shall receive not less than 20% of a use credit for the first performance as background music on a single program and 2% of a use credit for each subsequent such performance on such program, provided that no work shall receive credit for background use under this provision of more than 40% of a use credit for a single program.

(c) If the aggregate use credit allotted to qualifying works and works described in the last sentence of subparagraph (3)(b) above performed as background music per each quarter hour of programming would exceed four use credits, the use credit allotted to each such work shall be reduced pro rata so that all such works performed as background [fol. 1026] music on the entire program shall receive an aggregate of four use credits per each quarter hour of programming.

(d) When any qualifying work is performed as cue or bridge music, it shall receive only 10% of a use credit for all such performances within the first 60 minutes of any given two-hour period regardless

of the number of actual such performances, and for all additional such performances during the second hour it shall receive only an additional 1% of a use credit regardless of the number of actual performances.

(e) When any non-qualifying work is performed as cue or bridge music, it shall receive only 1% of a use credit for all such performances within the first 60 minutes of any given two-hour period regardless of the number of actual such performances, and for all additional such performances during the second hour it shall receive only an additional 10% of said 1% of a use credit regardless of the number of actual performances.

(f) When during any given two-hour period, any work is performed both

(i) as a feature performance or as background music, and

(ii) for cues or bridges, it shall receive for all such cue and bridge performances regardless of number only 1% of a use credit.

(g) Anything to the contrary notwithstanding, if more than one work is performed during any 15-minute period as cue or bridge music, they shall share the highest percentage of a use credit applicable to any work so performed as cue or bridge music, said [fol. 1027] sharing to be proportional to the relative percentage of a use credit which each work would otherwise have received as cue or bridge music during that period.

(4) *Jingles*: When any work is performed as a jingle it shall receive only 1% of a use credit for all such performances within the first 60 minutes of any given two-hour period regardless of the number of actual such performances, and for all additional such performances during the second hour it shall receive only an additional 10% of 1% of a use credit regardless of the number of actual such performances.

(5) *General Limitation*: Anything to the contrary notwithstanding, works performed on a dramatic program of 15 minutes or less, which is presented in serial form two or more times weekly (except feature performances), shall receive the following credits:

(a) If only one work is so performed, 5% of the otherwise applicable credit;

(b) If more than one work is so performed, such works shall collectively share the percentage of a use credit provided for in (a) above for the single work which would otherwise receive the highest percentage of a use credit, such sharing to be proportional to the relative percentages of a use credit which each such work would otherwise have received under (a) above during that period.

(D) *Serious Works Four Minutes or Longer in Duration*

Works which require four minutes or more for a single, complete rendition thereof, and which in their original form were composed for a choral, symphonic, or similar concert performance (including chamber music), shall receive credit [fol. 1028] on the following basis when performed for the respective designated periods of time:

Minutes of Actual Performance	The Otherwise Applicable Credit Is Multiplied by:
4:00 to 5:30	2
5:31 to 10:30	5
10:31 to 15:30	9
15:31 to 20:30	14
20:31 to 25:30	20
25:31 to 30:30	28
30:31 to 35:30	36
35:31 to 40:30	44
40:31 to 45:30	52
45:31 to 50:30	60
50:31 to 55:30	68
55:31 to 60:30	76
Each additional 5 minutes or part thereof	8

(E) *Concert and Symphony Performances*

The license fees which the Society receives from concert and symphony halls shall be multiplied by five in determining the credit to be awarded for performances of works in concert and symphony halls.

Performances on national radio network sustaining programs consisting of concerts by symphony orchestras which are presented as a genuine contribution to the culture of the nation shall be awarded credit equal to performances on a radio network of 50 stations.

[fol. 1029] (F) *Copyrighted Arrangements*

Except as hereinafter specifically provided, any arrangement of a work otherwise in the public domain which is separately published and separately copyrighted in the United States (or which, in the case of works described in paragraph 4 below, is available on rental) shall receive 10% of the otherwise applicable credit; if copyrighted as part of a compilation or folio, such an arrangement of a work otherwise in the public domain shall receive 2% of the otherwise applicable credit:

(1) If a copyrighted arrangement has the same title as the underlying original composition but contains entirely new lyrics, it shall receive 35% of the otherwise applicable credit.

(2) If a copyrighted arrangement has an entirely new title and contains entirely new lyrics, it shall receive 50% of the otherwise applicable credit.

(3) If a copyrighted arrangement has an entirely new title and contains both entirely new lyrics and substantial new melodic material, it shall receive 75% to 100% of the otherwise applicable credit. All classifications pursuant to this paragraph shall be made by the Special Classification Committee for Public Domain Arrangements.

(4) If a copyrighted arrangement, as well as the original underlying composition, requires four minutes or more for a single complete rendition thereof, it shall

receive from 10% to 100% of the otherwise applicable credit, depending upon the extent to which it embodies new material. All classifications pursuant to this paragraph shall be made by the Special Classification Committee for Public Domain Arrangements.

[fol. 1030]

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK
Civil No. 13-95

UNITED STATES OF AMERICA, Plaintiff,

v.

AMERICAN SOCIETY OF COMPOSERS, AUTHORS
AND PUBLISHERS, Defendant.

NOTICE OF APPEAL TO THE SUPREME COURT OF THE
UNITED STATES—Filed January 14, 1960

I. Notice is hereby given that Sam Fox Publishing Company, Inc., Movietone Music Corporation, Pleasant Music Publishing Corporation and Jefferson Music Company, Inc., applicants for intervention pursuant to Federal Rule of Civil Procedure 24(a)(2) in a proceeding in the above action commenced upon motion of the plaintiff for an order to further amend the Amended Final Judgment entered on March 14, 1950, hereby appeal to the Supreme Court of the United States from an order denying applicants' motion for leave to intervene entered in this action on November 16, 1959.

This appeal is taken pursuant to 15 U.S.C. § 29.

II. The clerk will please prepare a transcript of the record in this cause, for transmission to the Clerk of the Supreme Court of the United States, and include in said transcript the following:

[fol. 1031] A. All docket entries commencing with June 29, 1959.

B. Complaint filed February 26, 1941.

C. Final Judgment entered March 4, 1941.

D. Order directing that a hearing be held on October 19, 1959, entered June 29, 1959.

E. Proposed Consent Further Amended Final Judgment, and proposed Writers' Distribution Plan and proposed Weighting Formula submitted therewith.

F. Amended Final Judgment entered March 14, 1950.

G. Mailings to the membership of the American Society of Composers, Authors and Publishers dated July 10, 1959, July 21, 1959, August 26, 1959, September 4, 1959, October 5, 1959 and October 9, 1959, with proof of the service thereof.

H. Plaintiff's Memorandum in Support of Proposed Consent Further Amended Final Judgment, filed September 2, 1959.

I. Motion of applicants for leave to intervene, filed October 13, 1959, together with attached Pleading in Intervention and Memorandum in Support of Motion for Leave to Intervene Filed by Publisher Members of ASCAP, and proof of the service thereof.

J. Staff Analysis of Proposed Consent Further Amended Final Judgment, dated October 9, 1959, submitted by the Staff of Subcommittee No. 5 of the Select Committee on Small Business of the House of Representatives.

K. Memorandum on Behalf of Applicants for Leave to Intervene, filed October 19, 1959.

[fol. 1032] L. Transcripts of the hearing on October 19 and 20, 1959.

M. Exhibit G—Summary of ASCAP Balloting, dated January 7, 1960.

N. Exhibit J—Tally Sheets of ASCAP Balloting, dated January 7, 1960.

O. Transcripts of the hearing on January 6 and 7, 1960.

P. Consent and Order on Issues of Fact or Law on Amended Final Judgment, entered January 7, 1960.

Q. Order Adjudging that Article VII of the Proposed Consent Order Has Been Complied With and Effective Date of Said Consent Order is 1/7/60, entered January 7, 1960.

R. Consent and Order Amending Proposed Further Amended Final Judgment attached to Show Cause Order dated 6/29/59, entered January 7, 1960.

S. This Notice of Appeal.

III. The following questions are presented by this appeal:

In a proceeding brought by the United States to modify a judgment previously entered by consent in an action under the Sherman Act in order to strengthen parts of the judgment designed to protect the smaller members of an unincorporated association of music writers and publishers from unlawful injury by the dominating members of the association:

(1) Were some of the smaller members of the association entitled to intervene in the proceeding under Federal Rule of Civil Procedure 24(a)(2) for the purpose of urging further changes in the judgment and [fol. 1033] in the proposed modification thereof, which were necessary for their adequate protection from the dominating members, upon the ground that their interest was inadequately represented by the existing parties to the proceeding—the Department of Justice and the association's Board of Directors—and that they would be bound as association members by any judgment entered in the proceeding?

(2) Is the right of individual members of the association to move to intervene in the proceeding under Federal Rule 24(a)(2), on the ground that their interest is inadequately represented by the existing par-

ties and that they will be bound as association members by any judgment that is entered, dependent upon whether the association has been sued as an entity under Federal Rule 17(b) or in a class action under Federal Rule 23(a)(1)?

(3) Is the right of individual members of the association to intervene in the proceeding under Federal Rule 24(a)(2) to urge further changes in the judgment and in the proposed modification thereof barred because, although they are members of the association, they were not named parties to the original judgment that was entered in the antitrust suit by the United States?

Charles A. Horsky, Attorney for Applicants, Sam Fox Publishing Company, Inc., Movietone Music Corporation, Pleasant Music Publishing Corporation, Jefferson Music Company, Inc., 701 Union Trust Building, Washington 5, D. C.; Herbert Cheyette, 11 West 60th St., New York, N. Y. (CI 7-3890).

January 14, 1960.

[fol. 1034]

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK
Civil No. 13-95

UNITED STATES OF AMERICA, Plaintiff,

v.

AMERICAN SOCIETY OF COMPOSERS, AUTHORS,
AND PUBLISHERS, Defendant.

CERTIFICATE OF SERVICE

I, Charles A. Horsky, attorney for Sam Fox Publishing Company, Inc., Movietone Music Corporation, Pleasant

Music Publishing Corporation and Jefferson Music Company, Inc., applicants for intervention herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that on the 14th day of January, 1960, I served copies of the foregoing Notice of Appeal to the Supreme Court of the United States on the several parties thereto by mailing a copy in a duly addressed envelope, with postage prepaid, to their attorneys as follows:

1. On the United States—

Richard B. O'Donnell, Esq.
Attorney, Department of Justice
United States Courthouse
Foley Square
New York, New York

William D. Kilgore, Esq.
Department of Justice
Washington 25, D. C.

The Solicitor General
Department of Justice
Washington 25, D. C.

[fol. 1035] 2. On the American Society of Composers
Authors and Publishers—

Arthur H. Dean, Esq.
48 Wall Street
New York, New York

Charles A. Horsky, Attorney for Applicants, Sam Fox Publishing Company, Inc., Movietone Music Corporation, Pleasant Music Publishing Corporation, Jefferson Music Company, Inc., 701 Union Trust Building, Washington 5, D. C.; Herbert Cheyette, 11 West 60th St., New York, N. Y. (CI 7-3890).

[fol. 1036]

SUPREME COURT OF THE UNITED STATES

[Title omitted]

ORDER POSTPONING FURTHER CONSIDERATION OF QUESTION
OF JURISDICTION—May 23, 1960Appeal from the United States District Court for the
Southern District of New York.

The statement of jurisdiction in this case having been
submitted and considered by the Court, further consider-
ation of the question of jurisdiction is postponed to the
hearing of the case on the merits.

May 23, 1960

Mr. Justice Clark took no part in the consideration or
decision of this case.

[fol. 1037]

SUPREME COURT OF THE UNITED STATES

No. 56—October Term, 1960

SAM FOX PUBLISHING COMPANY, INC., ET AL., Appellants,

v.

UNITED STATES AND AMERICAN SOCIETY OF COMPOSERS,
AUTHORS AND PUBLISHERS, Appellees.

STIPULATION DISMISSING THE APPEAL AS TO APPELLANT MOVIE-
TONE MUSIC CORPORATION—Filed July 1, 1960

Pursuant to the letter of Charles A. Morsky, Esq., to
Howard T. Mihman, Esq., dated June 24, 1960, the parties
hereby stipulate that appellant Movietone Music Corpo-

ration is to be dismissed as an appellant in the above-named appeal.

Charles A. Horsky, Attorney for Appellants.

Howard T. Milman, Attorney for Appellee, American Society of Composers, Authors and Publishers.

J. Lee Rankin, Solicitor General, Appellee, the United States of America, by the Solicitor General.

Dated: June 27, 1960.

1960—July 6. The foregoing stipulation to dismiss Movietone Music Corporation as a party appellant in the above-named appeal having been received and there being no fees due the Clerk, Movietone Music Corporation is now here dismissed as a party appellant, pursuant to the 60th Rule of this Court.

James R. Browning, Clerk of the Supreme Court of the United States, By R. J. Blanchard, Deputy.

(Seal)